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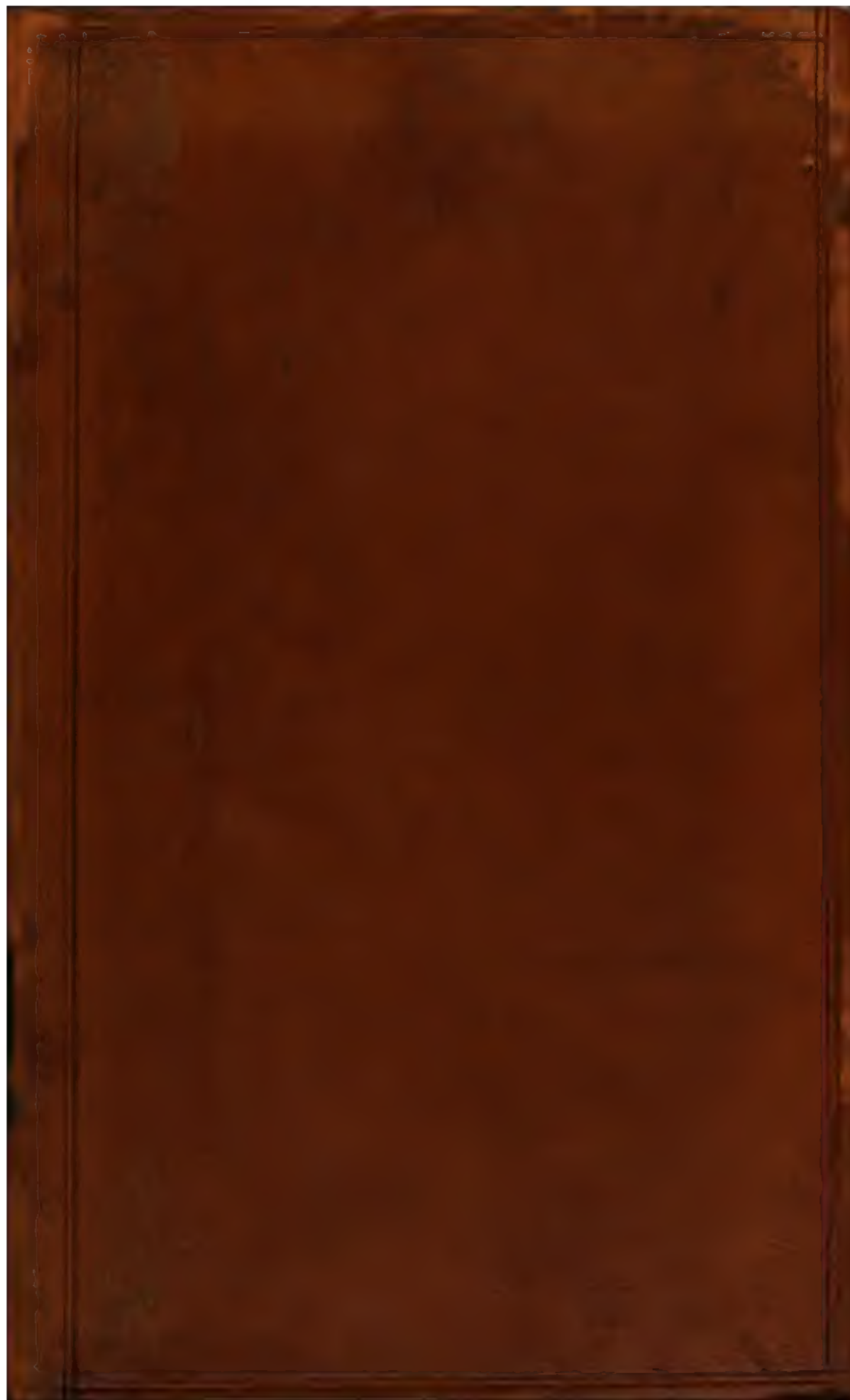
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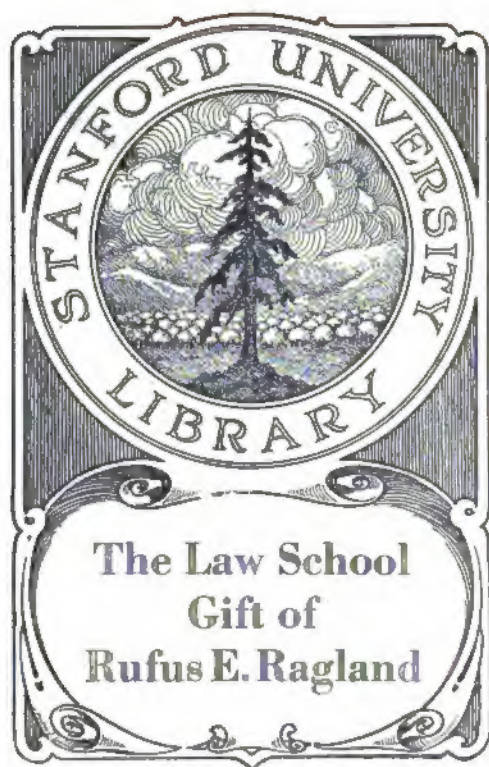
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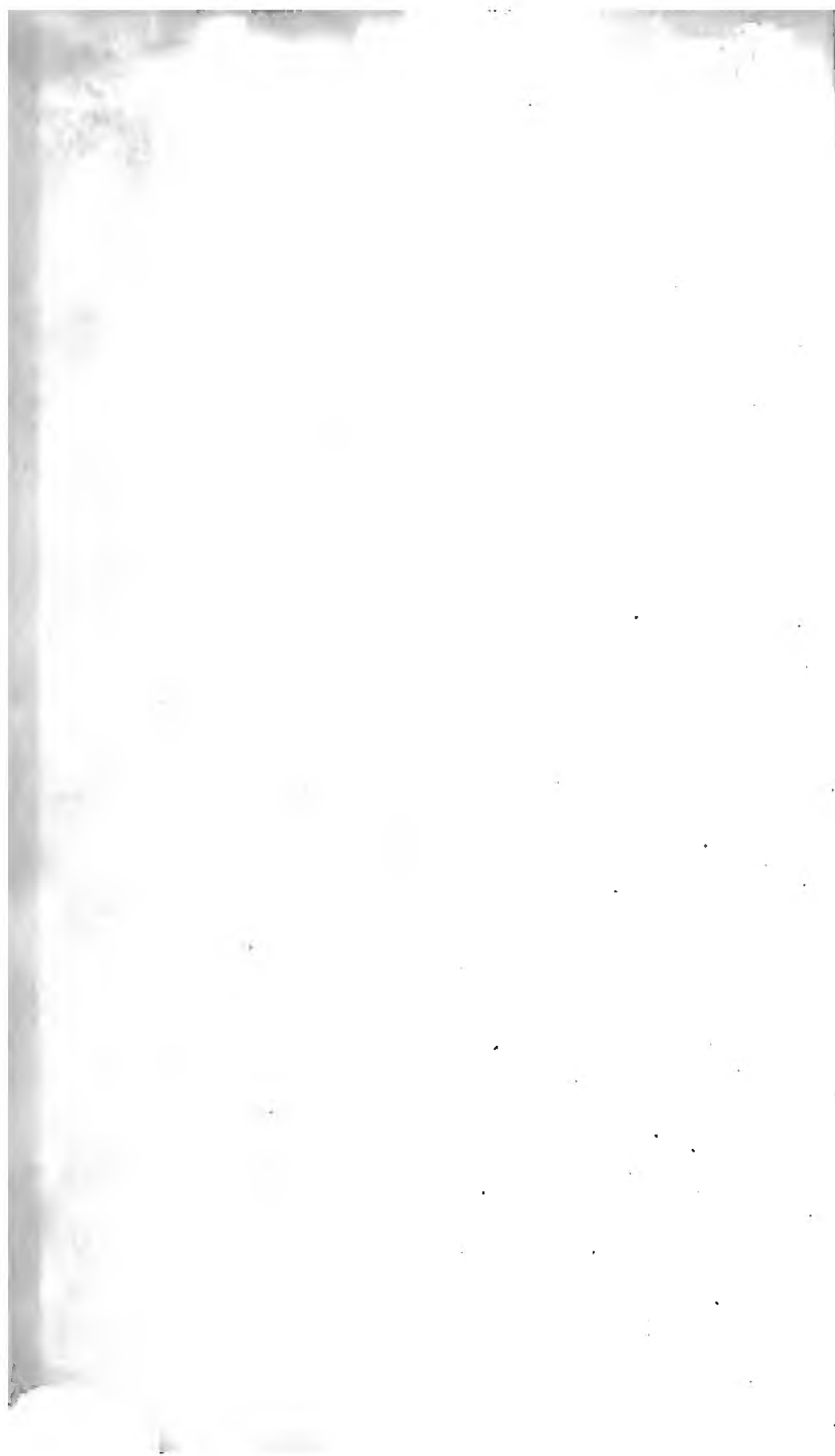




James P. Treadwell

James P. Smith





REPORTS
OF
CASES

ARGUED AND DETERMINED IN THE
English Courts of Chancery.

WITH NOTES AND REFERENCES
TO ENGLISH AND AMERICAN DECISIONS.

~~~~~  
**By E. FITCH SMITH,**  
**COUNSELLOR AT LAW.**  
~~~~~

VOL. XXV.
CONTAINING HARE'S CHANCERY REPORTS, VOL. III.
1843, 1844—6, 7, & 8 VICTORIÆ.

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1851.

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RIGHT HON. SIR JAMES WIGRAM, KNT.
VICE-CHANCELLOR.

~~~~~  
**By THOMAS HARE,**  
**OF THE INNER TEMPLE, ESQ., BARRISTER AT LAW.**  
~~~~~

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REPORTS OF CASES
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THE RIGHT HON. SIR JAMES WIGRAM, KNT.
VICE-CHANCELLOR.
COMMENCING IN
EASTER TERM, 6 VICT. 1843.

VANDERPLANK v. KING.

1843: May 3, 5, 6, 8 and 11.

Devise to A., the daughter of the testator, for life, and after her decease to all and every the child or children of A., male or female, begotten or to be begotten, and their assigns, for their respective lives; and after the decease and respective deceases of such child or children of A., to all and every the child or children of all and every such child or children of A., male or female, to be begotten, and the heirs of his, her, and their respective body and bodies, as tenants in common; and in case of the death of any of the said children of such child or children of A., and failure of issue of his, her, or their body or bodies respectively, then as well the original as the accrued share of such of them so dying without issue to go to the survivors and survivor, others or other of them, as tenants in common, if more than one; and for default of such issue, over. A. had three children born in the lifetime of the testator, and living at his decease, and one born after the testator's death. One of the three born in his lifetime died during the life of A., without issue:—

Held,

That the children of A. took as tenants in common, and not as joint tenants.

That, inasmuch as the children of the after-born child of A. could not take as purchasers, the devise would be supported according to the rule of cy pres or approximation, by giving an estate tail to the after-born child of A.

That the rule of cy pres, being an arbitrary principle of construction, introduced to effect the intention of a testator in the exigency of a particular case, was not to be applied, except when the necessity of the case required it; and that therefore, although the devise was to the children of A. as a class, the children of A. born in the testator's lifetime would take estates for life, and the estates devised to the children of the after-born child would alone be altered.

 1843.—Vanderplank v. King.

That cross-remainders were to be implied between the children of A., and therefore that the three children of A. who survived or left issue took, according to their respective estates, the share of the child of A. who died without issue; and that the inequality among the devisees, some of them being tenants in tail, and others tenants for life with remainder to their issue in tail, was no objection to the implication of cross-remainders among them.

RICHARD HANWELL, by his will, dated in 1792, devised
 [*2] all his freehold messuages, closes, meadows, *tithes, rents, hereditaments, and real estates, situate in the town fields, and parishes of Long Buckley, Walford, Guilsborough, and elsewhere, in Great Britain, not thereinbefore otherwise disposed of, unto his daughter, Jane King, and to her assigns, for and during her life, without impeachment of waste; and from and after any determination of that estate in her lifetime, to the use of trustees and their heirs, to preserve the contingent uses and estates thereafter limited; and from and immediately after her decease, to the use of all and every the child or children of the body of his said daughter Jane King, whether male or female, lawfully begotten or to be begotten, and of his, her, and their respective assigns, for and during his, her, and their respective life and lives; and from and after any determination of that estate in the lifetime of the said child or children of his said daughter, to the use of the same trustees, to preserve, &c.; and from and after the decease of any such child or children of the body of his said daughter Jane King, and the respective deceases of all and every such child or children, and as they should severally and respectively depart this life, to the use and behoof of all and every the child or children of the body and bodies of all and every such child or children of his said daughter Jane King, whether male or female, lawfully to be begotten, and the heirs of his, her, and their respective body and bodies, such children to take in equal shares as tenants in common, and not as joint tenants. And in case of the death of any of the said children of such child or children of his said daughter Jane King, and failure of issue of his, her, or their body or bodies respectively, then the testator devised and bequeathed as well the original part or share of each of them so dying, and of whom there should be a failure of issue as afore-

1843.—Vanderplank v. King.

said, as also such other part or share as should have vested in him or her or his or her issue by way of survivorship or accruer upon the death and failure of issue *of any other [*3] or others of the said children, unto the survivors and survivor or others or other of them, such survivors or other children to take as tenants in common and not as joint tenants. And in case all such children of such child or children of his said daughter Jane King, but one, should die without issue, or in case there should be only one such child, then the testator devised and bequeathed the same unto such only child, and the heirs of his or her body: and for default of such issue, he devised all the said freehold messuages, closes, meadows, tithes, rents, hereditaments, and real estate unto his grandson William Hanwell Lucas and his assigns for his life, without impeachment of waste, with remainder to the use of all and every the child or children of his said grandson, whether male or female, lawfully to be begotten, and the heirs of his, her, and their respective body and bodies, in equal shares. And in case of the death of any of the said children, and failure of issue of his, her, and their body or bodies respectively, then the share or shares which should so fail to go to the survivors of such children as tenants in common, if more than one; and for default of such issue, the testator devised two third parts of the said hereditaments and real estate unto his two sisters, Sarah and Elizabeth, severally, and to their several heirs and assigns, and the remaining third part unto his nephews and nieces therein named, equally, as tenants in common.

The testator died in 1792.

At the time of the death of the testator, his daughter Jane King was living, and had three children: Elizabeth, born in 1785; John, born 1787; and Jane, born in 1790: William Hanwell Lucas, the son of a deceased daughter of the testator, and John, the son of the daughter of Jane King, were his co-heirs.

*In 1793, after the death of the testator, Matilda, another [*4] child of his daughter Jane King, was born.

The testator's daughter Jane King died in February, 1831.

Of the four children of Jane King, Jane died in 1799, without having been married: Elizabeth, in 1821, married Samuel Van-

1843.—Vanderplank v. King.

derplank, and died in 1824, leaving the plaintiff Elizabeth Jane Vanderplank, born in 1822, her only daughter surviving: John married in 1813, and had three daughters, born in 1814, 1815, and 1817, respectively; and Matilda married in 1819, and had three children, born in 1822, 1823, and 1826, respectively.

William Hanwell Lucas died in 1810, having devised his real estate upon trust for his wife for life, with remainder to his children, remainder to the right heirs of his father. The widow afterwards married D. Bishopp. The heir-at-law of his father was T. F. Lucas, who became bankrupt.

After the death of Jane King, John King, her son, entered into the receipt of the rents and profits of the estate. The bill was filed in 1836 by Elizabeth Jane Vanderplank, the infant daughter of the daughter Elizabeth, against the said John King, who was the surviving co-heir of the testator,—the devisees of the deceased co-heir, William Hanwell Lucas,—the daughter Matilda, and her three children, and Samuel Vanderplank. The bill suggested that John King had brought an ejectment against Samuel Vanderplank, who was the plaintiff's natural guardian, and was in the occupation of part of the premises; that Samuel Vanderplank would have no defence to the action, inasmuch as

he had for several years paid rent to John King in respect [*5] of the premises; *and that as to the plaintiff's share of the estate, John King must be deemed and treated as having entered thereon in the character of guardian and trustee for the plaintiff.(a) The bill prayed that John King might be ordered to account to the plaintiff for one-third of the rents and profits of the estates received by him since the death of Jane King, his mother, including the produce of timber felled, and that one-third of the future rents and profits might be secured for the plaintiff's use; that if there was any question of the validity of the devise to the plaintiff, an issue at law might be directed; that in the mean time the title-deeds might be deposited in court, a receiver appointed, and the defendant John King restrained by injunction from proceeding in the ejectment or committing waste.

(a) Vide 1 Hare, 602, n. (a.)

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April 28th.—Inquiries of the state of the families were directed by the decree, and the cause came on for further directions on the report; but it appearing that the three daughters of John King were not before the court, the case stood over for the purpose of making them parties to the suit; which being accordingly done,—

May 3rd.—Mr. *Tinney* and Mr. *Malins* were heard for the plaintiff.

The limitation to the children begotten and to be begotten, includes not only those living at the testator's death, but those born afterwards, one of the children (*Matilda*) being in the latter predicament. As the limitation to the children of unborn persons, as purchasers, would be obnoxious to the rule against perpetuities, the limitation in this case cannot take effect in the form which the testator has expressed: if the purpose were not aided by another principle of law, the devise would *there- [*6] fore in this respect be void: *Routledge v. Dorril*,^(a) *Mogg v. Mogg*.^(b) The general intention of the testator, manifest upon the will, however, is that all the children of his daughter *Jane King* shall take under the devise. In the construction of the will, the court will give effect to the intention, and regard the mode by which the testator has sought to accomplish it as the result of a mistake or inadvertence to the rule of law which the devise would infringe; and accordingly the object will be effectuated, not precisely in the manner contemplated, but *cy pres*: *Humbertson v. Humbertson*,^(c) *Hopkins v. Hopkins*,^(d) *Chapman d. Oliver v. Browne*,^(e) *Robinson v. Hardcastle*,^(g) *Pitt v. Jackson*,^(h) *Nicholl v. Nicholl*.⁽ⁱ⁾ In the application of the *cy pres* doctrine to this case, estates tail will be given to all the children. The devise being to a class, the same rule must

(a) 2 Ves. jun. 357.

(b) 1 Mer. 654.

(c) 1 P. Wms. 332; 2 Vern. 737; Prec. Chan. 455; Gilb. Eq. Ca. 128; 1 Eq. Ca. Ab. 207, pl. 8.

(d) Ca. temp. Talbot, 44; 1 Atk. 581; West. Ca. temp. Hard. 606; Co. Lit. 272; a. (Butler) note vii. 2.

(e) 3 Burr. 634.

(g) 2 T. R. 241.

(h) 2 Bro. C. C. 51. See *Smith v. Lord Camelford*, 2 Ves. jun. 698.

(i) 2 W. Bl. 1159.

 1843.—Vanderplank v. King.

be applied to all the members of that class: *Leake v. Robinson*.^(a) The result is, that the *four* children of the testator's daughter became originally tenants in common in tail, in remainder expectant on the decease of Jane King, their mother, the tenant for life. On the death of Jane, the daughter of Jane King, without issue, in 1799, the *three* surviving children became tenants in common in tail. There is no longer any presumption or inclination of the court against implying cross-remainders between more than two persons: *Watson v. Foxon*,^(b)

Doe d. Gorges v. Webb,^(c) *Green v. Stephens*,^(d) *Cursham v. Newland*.^(e) And *therefore on the death of Jane

King, in 1831, the plaintiff and the two surviving children of Jane King became tenants in common in tail in possession, the cross-remainders between the several families being implied: 1 Powell on Devises, by Jarman, p. 409, et seq.

Mr. *Russell* and Mr. *Stinton*, for the defendant Matilda and her children.

Matilda, as the after-born daughter of Jane King, according to the words of the will, literally taken, is tenant for life of one share of the estate, and the devise to her would so far be valid; but as the consequence of restricting her interest to a life estate would be to render the devise to her children void for remoteness, the court, on the cy pres doctrine, will enlarge her interest to an estate tail, whereby the children will not be excluded. These defendants therefore adopt the argument of the plaintiff, to the extent of insisting upon the cy pres construction of the will.

Mr. *Tillotson*, for the three daughters of John King, claimed, under the strict words of the limitation, the first estate tail in remainder as tenants in common, with cross-remainders between them, in one-third of the estate, in the events which had happened, and on the principle of implying cross-remainders between the grandchildren of the testator and their respective families.

Mr. *Kenyon Parker*, for the defendant Samuel Vanderplank.

(a) 2 Mer. 363.

(b) 2 East, 36.

(c) 1 Taunt. 234.

(d) 17 Ves. 64.

(e) 2 Beav. 145.

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Mr. *Cooper* and Mr. *Metcalf*, for John King.

The defendant, as a co-heir-at-law of the testator, *insists [*8] that the limitations, beyond the life estates, are void for remoteness,—that there are no cross-remainders to be implied between those life estates, and that consequently the plaintiff has no interest in the estate,—the defendant Matilda has no interest after the expiration of her own life estate, and the other defendants have no interest whatever. The gift is to a class, and the court cannot, under the same expression in the will, give one kind of estate to one child, and a different kind of estate to the others: *Leake v. Robinson*. The whole must be good or none. The argument in fact has been, not that the three children born during the testator's life take life estates, with remainder to their issue in tail, and that the after-born child alone takes an estate tail; but it has been argued that all the four children take estates tail: an alteration of the general effect of the devise, which cannot be effected on the notion of sustaining the general intention. The cases in which the cy pres doctrine has been applied are chiefly cases of executory trusts, or cases of the execution of powers, in which the court has looked upon the will as rather a manifestation of what the testator desired should be done, than as an instrument itself effecting the object. There is here nothing executory: it is a devise to uses, and is therefore a purely legal question. The tendency of the cases has been to confine the cy pres doctrine within the strictest limits: it is not applicable to a deed: *Adams v. Adams*,^(a) *Brudenell v. Elwes*:^(b) nor where the limitation to the children of the unborn persons would give them an estate in fee-simple: *Bristow v. Warde*,^(c) *Jesson v. Wright*,^(d) 1 Jarman on Wills, p. 263; Fearne, Contingent Remainders, p. 208, n. ed. 9; 2 Sugden on Powers, 60, et. seq.

*There are two objections to the construction of the [*9] plaintiff with respect to the cross-remainders. First, that cross-remainders are actually limited, in some events, in the families of the children, as among themselves, and that limitation repels the attempted implication of cross-remainders upon

(a) Cowp. 651.

(c) 2 Ves. jun. 336.

(b) 1 East. 422; S. C. 7 Ves. 382.

(d) 2 Bligh, 1.

1843.—Vanderplank v. King.

other events: *Clache's case*.(a) Secondly, supposing some of the children of Jane King to take estates for life, and others estates tail, there is no reciprocity between the two estates: the interests are unequal. The party having an estate tail has not an equal chance with another having only an estate for life; he may lose an estate tail, but he cannot in any event acquire one from the other remainder-man.(b)

Mr. *Temple* and Mr. *Messiter*, for the defendant Mrs. Bishopp, one of the devisees of William Hanwell Lucas, in support of the argument against the application of the cy pres doctrine and the implication of cross-remainders, cited *Seaward v. Willock*,(c) *Mortimer v. West*,(d) *Doe d. Gallini v. Gallini*,(e) *Parr v. Swindels*,(g) *Pery v. White*,(h) Prior on Limitations to Issue, &c., pp. 60, 167; Hayes' Intro. to Conveyancing, p. 425;(i) Walters' Essay on Cross-remainders, pp. 70-73.

Mr. *Smythe*, for the assignee in bankruptcy of T. F. Lucas, one of the devisees of William Hanwell Lucas, the co-heir of the testator.

[*10] *The testator has plainly intended to give precisely similar interests to all the children of Jane King, as one class, and precisely similar interests to all her grand-children, as another class. It was not his intention that any of the grand-children should take an interest in possession in any part of the estates during their parent's lifetime. The estates of the children of Jane King are joint estates, and John, Elizabeth, and Matilda taking jointly for life, no interest in the estate goes over so long as any of the tenants for life is alive. The plaintiff therefore has not acquired any interest in the estates, inasmuch as two of the tenants for life are still living: *Pearce v. Ed-*

(a) Dyer, 330. b.

(c) 5 East, 198.

(b) See 2 Jarman on Wills, p. 480.

(d) 2 Sim. 274.

(e) 5 B. & Adol. 621; S. C. 3 Ad. & Ell. 340.

(g) 4 Russ. 283.

(h) Cowp. 777.

(i) See Lewis on Perpetuities, p. 426, n., (π) where he distinguishes the use of the terms "general and particular intention," in reference to the cy pres doctrine, from its use in a different class of cases.

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meades.(a) In further support of the argument against the application of the cy pres doctrine, he cited *Griffith v. Harrison* ;(b) and against the implication of cross-remainders, *Doe d. Blandford v. Applin.*(c)

VICE-CHANCELLOR.—The parties having desired that I should give my opinion on this case, without requiring the decision of a court of law, I shall accede to that request ; although it would have been far more satisfactory to have had the judgment of a court of law.

I have considered the question during the argument, with reference to the cy pres doctrine, and upon that part of the case I do not think that I am at liberty to exercise my discretion. That doctrine is now sufficiently simple, and is well established, though sometimes of difficult application. If an estate is given to a person for life, or indefinitely, and after failure of issue of such person, it is given over, the court implies an estate tail *in [*11] the first taker, sacrificing only, in that simple case, the life estate, in order that all the issue may be embraced in the limitation. The next case which may be noticed is where a testator, after giving a particular estate to the first taker, has gone on to direct that it shall go to unborn persons in a way which would create a perpetuity, with a limitation over on failure of issue of the first taker. The court, in such a case, is embarrassed with the fact, that besides the gift over, which, in the simple case first stated, would create an estate tail, there is a direction that the estate shall devolve in a manner not allowed by law, but which in common cases, previously to *Pitt v. Jackson*,(d) would, so far as respected the order of succession, only be consistent with and included in an intention to give an estate tail. The courts were thus placed in this position : the intention to give the estate to particular persons, in particular order of succession, was manifest ; but the specified mode in which those persons were to take being excluded by the rule of law against perpetuities, the question was, whether the primary intention to benefit particular persons, in a particular order of succession, should be accomplished, and

(a) 3 Y. & Coll. 246.

(b) 3 Bro. C. C. 410.

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(c) 4 T. R. 82.

(d) 2 Bro. C. C. 51.

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the particular mode of giving effect to it be rejected, or the whole will be inoperative. This was the difficulty with which the court had to struggle. Whether the two expressed intentions, both of which could not be effectuated, were well or ill described by the terms "general" and "particular" intention, or whether the criticism upon those expressions is just, appears to me immaterial. It is a mode of characterizing the different, and, to a certain extent, conflicting intentions of the testator, which satisfied Lord Eldon and other Judges of great eminence. The meaning of the terms is now sufficiently understood. In order to preserve and effect something which the court collects [*12] from the will, to have been the paramount object of the testator, it rejects something else, which is regarded as merely a subordinate purpose, namely, the mode of carrying out that paramount intention.

In the application of this doctrine prior to the case of *Pitt v. Jackson*, the court so dealt with the language of testators, as to give the same corpus to the same individuals, and in the same order of succession as directed by the will. *Pitt v. Jackson* went much farther than that. In the first place, by giving an estate tail to the parent, the estate of the children was altogether cut out; and not only was their estate rejected, but a larger corpus than the testator intended was given to the first takers. The whole estate, by the construction put upon the will, was limited so as to go to the parties in succession, instead of vesting in them contemporaneously, which was the will of the testator. Probably, a judge of less weight than Lord Kenyon would scarcely have established the application of the cy pres doctrine to such a case.

Taking the doctrine to be established, I confess I could never see how it was a less violent act to apply it to what is sometimes called an executory trust, than to the case of a purely legal devise. The two cases appear to me not distinguishable; and it is admitted that the decisions in equity establish that in the case of a direction to convey in a particular mode, the court will apply the doctrine of cy pres. But *Hopkins v. Hopkins*,^(a) and *Nicholl*

(a) Ca. temp. Talbot, 44. 1 Atk. 581. West. Ca. temp. Hard. 606.

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v. *Nicholl*,^(a) were cases of legal devises, and there is therefore direct authority for the application of the doctrine to the case of a legal devise. The cases *of powers are stronger [*13] rather than the weaker examples of the same construction: there the intention is expressed to do that which the party cannot lawfully do, and the court cuts out the particular direction which is illegal, but gives the estates to the parties, so as to carry into effect the general intention. In point of fact, when the estate is once created by the power, so as to take effect under the original devise, the case is the same as if it had been a legal devise. To all these cases the doctrine of cy pres has been applied; and so far as this case calls for it, I am bound to apply the rule laid down in *Pitt v. Jackson*.

The next question is, in what way the rule is to be applied with reference to the case of Matilda. Now the devise is to a class—to the children of unborn children of Jane the daughter; and it is clear that for the purpose of determining whether the whole of that class can take, I must look at the events as they existed at the death of the testator. I cannot wait for subsequent events, so as to see whether a difficulty will be created by the birth of other children of Jane. If Jane, the first tenant for life, had died in the lifetime of the testator, there might have been no difficulty. Jane having survived her father, the difficulty has arisen; and as the estates were limited to the unborn children of Jane, and the unborn children of such unborn children, the limitations in the will could not take effect as to some of the class; and as I understand the rule laid down by Sir W. Grant in *Leake v. Robinson*,^(b) if some of the class cannot take, the others cannot, for there has been no gift to any of them apart from the gift to the others of the class. It would be impossible to say what any one separately, and not as a member of the entire class, *should take; the whole class therefore [*14] must be excluded, unless the cy pres doctrine is to be applied; and that being so, it seems to me it must be applied to the share of Matilda.

The question then arises, whether, being obliged to alter the

(a) 2 W. Bl. 1159.

(b) 2 Mer. 363. *Jee v. Audley*, 1 Cox, 324.

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limitations in the case of Matilda, I am therefore bound to alter them in the cases of the other children of Jane : upon that point I feel great difficulty. The devise is to all the children of Jane, born and to be born, equally, and to their children. To ascertain the class, it is necessary to apply the reasoning to which I have adverted. Having ascertained the class, and decided that they shall take by the cy pres doctrine rather than the will be inoperative, I find some of them whose estates I must break in upon to preserve the general intention, and others with respect to whom there is no necessity for doing so. I am to apply an arbitrary doctrine, introduced merely to preserve the estates as nearly as may be, to those to whom the testator intended they should go ; but I cannot see the logical necessity of going on to apply it beyond the immediate exigency of the case ; of extending its application to each separate set—to limitations which do not require it—merely for the sake of adhering to one uniform rule throughout the limitations to the different branches of the family. I am bound to disregard events for the purpose of ascertaining the class ; but why am I bound to disregard them, in determining what estates the parties take ? Why may I not be governed, in that particular, by the exigencies of each branch of the limitation at the death of the testator ? If, on the other hand, I should be of opinion that cross-remainders ought to be implied, supposing all the children of Jane to take estates tail, but that they are not to be implied if some of those children take estates for life and other take estates tail, and if

[*15] *the clear intention was to give cross-remainders, as between the different children of Jane, it is a strong argument for saying that the doctrine of cy pres requires that you should deal with every branch of the family of Jane in the same manner. If, however, it is not necessary to alter any given line of limitations in order to support it, I am not at present satisfied of the existence of any rule of law which obliges me to do so, only because another distinct line of limitations cannot be supported without the application of the cy pres doctrine.

May 11th.—VICE-CHANCELLOR.—In the argument of this case, it was agreed by all parties, that the devises posterior to

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the estate for life given to Matilda the after-born child of Jane the daughter, could not take effect as estates by purchase, and the devise being to the children of Jane as a class, it was properly admitted that the same vice which affected those estates must affect the estates posterior to the life estates of all the children.

The questions argued before me were,—first, whether the children of Jane were joint tenants or tenants in common under the will; secondly, supposing them to be tenants in common, whether I could apply to this case the cy pres doctrine, regard being had to the circumstances that the grandchildren of Jane were to take as tenants in common; thirdly, assuming that the cy pres doctrine might and ought to be implied, and admitting that it must be so applied to the share of Matilda, as to give her an estate tail,—whether estates tail must also be given to the children of Jane who were living at the death of the testator, or whether, as to such children of Jane as were living at the death of the testator, the estates given by the will might not take effect in the way the will pointed out; and, lastly, [*16] whether cross-remainders should be applied, as to the share of Jane the grand-daughter, or whether the estate went over upon her death without issue, to the ultimate devisees named in the will, or to the co-heirs at law.

Upon the first two questions, I retain the opinion expressed in the course and at the close of the argument. I think it impossible to read the will as giving estates in joint tenancy to the children of Jane the daughter of the testator, and I think the case of *Pearce v. Edmeades*(a) is clearly distinguished from the present case. And for the reasons I gave at the close of the argument, I think the cy pres doctrine must be applied so as to sustain the will, in its application to the after-born child Matilda, and so as to sustain, as far as it can be sustained, the intention that the descendants of the after-born child Matilda should take an interest in the estate. The case of *Pitt v. Jackson*(b) must

(a) 3 Y. & Coll. 246.

(b) 2 Bro. C. C. 51.

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be treated in this court as settled law, until it is shaken by the highest authority in the law.[1]

With respect to the third question,—the testator has given his property to be equally divided between the members of a class in certain estates and interests; according to which equality between the different branches of the class was certainly contemplated. The court, in order to preserve the limitations in the branch of Matilda, is constrained to alter the estate given to her by giving to her an estate tail; thereby, in effect, depriving her descendants of all direct interest, and (unless the estates of the other branches are to be altered as well as that of Matilda) introducing an inequality between the interest given to the branch of

Matilda, and the other branches of the family of Jane the [*17] daughter. And if *in consequence of so altering the estate in the branch of Matilda, it were necessary to alter the estates in the other branches, in order to preserve any limitations in the will, I have no hesitation in saying the court might alter the estates in those other branches also: but if the inequality introduced between the branches, by the alteration of the estate given to Matilda,—not altering any other estate,—does not

[1] The principle of the doctrine of *cy pres* is this: That where there is a general and also a particular intention, and the particular intention cannot take effect, the words shall be so construed as to give effect to the general intention. Vice-Chancellor Wigram, 7 Jurist, 549, 552. A legal writer states the rule thus: "A rule of law where a testator has two objects, one primary or general, and the other secondary or particular, which are incompatible, the particular intention must be sacrificed, in order that, as far as possible, effect may be given to the general one." The same author illustrates this rule thus: "If a testator manifest a general intention that a particular unborn devisee and his issue should take certain property, but in consequence of the interest of the issue being limited by purchase, the particular words adopted by the testator of carrying into effect his primary intention, be contrary to law, the courts have, in support of the testator's general intention, to provide for the issue of the devisee; sometimes held, that that issue shall take derivatively through the ancestor, by taking an estate tail in him, which is conformable to the rules of law." Lewis on Perpetuities, 426. For cases where this rule has been applied, see *Humberston v. Humberston*, 1 P. Wms. 332; *Chapman v. Oliver*, 3 Burrow, 1626; *Nicholl v. Nicholl*, 2 Sir Wm. Blackstone R. 1159; *Robinson v. Hardcastle*, 2 Term R. 241; *Pitt v. Jackson*, 2 Bro. C. C. 51. That there must be a clear *indici-um* of an intention that the issue of the unborn person should take estates tail, or should succeed in a mode analogous to the cause in which an estate had never descended, see 2 Sugden on Powers, 65; *Bristow v. Warde*, 2 Ves. jr., 336.

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interfere with any of the ulterior limitations, the question is, whether the court is bound to alter more of the will upon the cy pres principle than the exigencies of the case call for. Now, assuming that no ulterior remainders would be affected by the inequality referred to, I think I am not bound to apply the cy pres doctrine to any devise in the will but those which demand its application, in order that the devise may be sustained. Then, does the necessity for applying the cy pres doctrine exist in any of the branches except that of Matilda? I think not. I admit that, where at the death of a testator his will may or may not create a perpetuity according to events, the court cannot await those events, but must put a construction upon the will of the testator at his death, with reference to every event which the will may contemplate; and full effect has been given to that rule in the admission properly made in argument, that the estates by purchase given by this will to the children of the after-born children of Jane, the daughter, affect the validity of the devises by purchase to the grandchildren of Jane, the daughter, although born of parents who were living at the death of the testator. To determine the validity of a given set of limitations, the will must be applied to the facts of that particular case, as they stood at the death of the testator, and not as they stood at the date of the will. And where there are several sets of limitations, I think I am bound to take the case as it stood at the death of the testator, and to apply the cy pres *doctrine to those [*18] cases only which at that time require that it should be applied, and so far only as each case may require its application. Suppose the testator had given different undivided portions of his estate to each of the children of Jane, the daughter, distributively, repeating the ulterior limitations in the will, in their application to each undivided share, and to the respective families, I cannot conceive that a doctrine, founded upon the principle of approximation, ought then unnecessarily to be applied to distinct shares of the estate, so as to destroy the intention in any particular case, only because with respect to another share the particular intention is necessarily sacrificed to preserve the general or paramount intention. And if that would be right in the case of a will worded as I have supposed, I think I must con-

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strue a will, expressed as this testator has expressed himself, in the same way, *i. e.* distributively, with respect to each share into which the property becomes divisible. The cases of *Humberston v. Humberston*(*a*) and *Bankes v. Le Despencer*(*b*) appear to warrant this conclusion.(*c*)

Then, will any ulterior consequences follow from this mode of dealing with the will, which might be avoided by applying the *cy pres* doctrine to all branches of the family alike? With respect to the implication of cross-remainders,—the reasoning which has been considered sufficient to warrant and establish the doctrine as between a class of devisees in tail has been of this nature: first, that the testator could not have intended that one of the devisees should take the whole estate, if no other were born to share it with him,—and, at the same time, [*19] *have intended, that, if others were born and died immediately, such a circumstance should deprive the survivor of the shares of the deceased children in the estate. Secondly, that the testator has clearly intended, by the very expressions he has used, that the estate shall go to the heir-at-law or remainderman as one entire estate, at one time, and not by fractions; and that the event upon which the estate was to go was the failure of issue of all the devisees,—an intention, which, upon the ordinary doctrine of implication, supposed an estate in the whole of the property to exist in all those devisees. Upon this reasoning, if the testator had himself given estates tail to the children of Jane, his daughter, the gift over of all and singular the premises, upon the failure of,—“in default of such issue,” (which, without relying upon the words of survivorship immediately preceding, must, I think, be construed all the issue of Jane, the daughter,) would have obliged me to imply cross-remainders between the estates of the devisees. The same reasoning would, I think, have obliged me to make the same implication, if the estates for life to all the children of Jane, the daughter, could have been supported, and no cross-remainders between

(*a*) 1 P. Wms. 332.

(*b*) 11 Sim. 508.

(*c*) The opinions of several counsel of eminence were taken upon the will. That of the late Mr. Charles Butler accorded with the decision upon this point.

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the grand-children in each family had been expressly given by the will: *Roe d. Wren v. Clayton*.^(a) And if such an implication would be admissible in the two cases I have suggested, it must be admissible in this case, unless I am to exclude it upon the ground, that, where cross-remainders are expressed in one part of a line of limitations, they cannot be implied in another, or because of the difference between the limitations which I now suppose to exist between different branches of the class of devisees.

On the first of these points, that express cross-remainders *exclude cross-remainders by implication, *Clache's* [*20] *case*^(b) was referred to. On the second ground, the argument was, that there would be a want of equality or reciprocity between the children, if cross remainders implied where the estates were not equal. Now, it seems to me that there is a substantial difference between the reasoning applicable to a devise to individuals as tenants in common, and a devise to a class as tenants in common. In the case of a devise to individuals as tenants in common, if any of them die in the lifetime of the testator, the survivors do not take the whole, but there is a lapse. This is the first ground on which cross-remainders are usually implied, and, in my judgment, it is by far the strongest and most satisfactory ground, that the testator could not have intended, that, if there was one devisee only living at his death, that one should take the whole estate, but if there were two, and one died the next moment, that then the survivor should not take the whole; and this reasoning does apply to the case of a class, but not to the case I have supposed. *Clache's case*, if so considered, would be very much weakened as an authority to govern the case of a class. I have read attentively the cases as collected in *Powell on Devises*,^(c) with Mr. Jarman's observations upon them, and the conclusion which I have formed is, that any court would, in the present day, with the disposition of construction which now prevails, carry out established principles, wherever it was certain that, by so doing, the intention of the testator was

(a) 6 East, 628.

(b) Dyer, 330 b.

(c) Vol. 1, p. 406 *et seq.* See 2 Jarman on Wills, 461 *et seq.*

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effectuated; and that any court would now hold, that an express gift of cross-remainders in one event did not preclude the court from giving cross-remainders by implication in another, either case being clearly within ^{the} scope of the reasoning upon which courts have proceeded in implying cross-remainders.

The argument of the want of reciprocity, I confess, I cannot understand: the only person damnified by the implication of cross-remainders is the ultimate remainderman, whose estate is postponed. As to the different branches, the state of circumstances which supposes a case for cross-remainders to arise supposes also that one of those branches is extinct; and the extinct branch, of course, can have no interest in the question. With regard to the other branches, the reasoning which has been considered sufficient to justify the court in giving cross-remainders by implication will apply, whether you suppose or not that one of the branches took an estate tail, and that, as to the other, the first taker took for life, and his descendants took estates in tail. The reasoning is the same in both cases. The intention was, that every one should take alike originally, as if there was no other to share with him. The intention could not have been (so the court holds) that any one branch should lose the substantial part of the estate, only because there happened to be a person to share with him for one moment. The testator intended that the property should continue in each line so long as there were descendants of that line to take; and that it should go over when, but not before, a complete failure of issue took place.

1843.—Ex parte the Feoffees of Addies' Charity, in re London & Greenwich R. Co.

***EX PARTE THE FEOFFEEES OF ADDIES' CHARITY, IN [22]
THE MATTER OF THE LONDON AND GREENWICH
RAILWAY COMPANY.**

1843: May 29, and June 2.

The act which enabled a company to purchase and take land for making a railway provided that the costs of the "contracts, sales, and conveyances," should be borne by the purchasers.

Held, that the vendors were, under these words, entitled to be reimbursed the costs of making out their title to the land purchased by the company.

THE act for incorporating the London and Greenwich Railway Company(*a*) empowered the company to purchase lands necessary for the undertaking, and enabled all bodies and persons whomsoever, in the words of the act, "who are or shall be seised or possessed of or interested in any such lands, tenements, or hereditaments, to contract for, sell, and convey the same, or any part thereof, unto the said company; and all such contracts, sales, and conveyances shall be made at the expense of the said company."*(b)* The company purchased some land at Deptford, from the feoffees of Addies' charity, at a price agreed upon, and afterwards assessed by a jury, and which was paid into the bank of England, according to the provisions of the act in such cases. The petition of the feoffees prayed that the costs, charges, and expenses incurred by them, as such feoffees and trustees, upon and in relation to the contract with, and sale and conveyance to, the company, and in making out their title to the land so purchased and taken by the company, might be taxed; and that the company might be ordered to pay such costs, charges, and expenses; and that the purchase-money might be re-invested upon the trusts of the charity.*(c)*

The only question was, whether the company was bound to pay the feoffees the costs they had incurred in making out their title.

(*a*) 3 & 4 Will. IV., c. xlvii.

(*b*) Sect. 39.

(*c*) Sect. 75 provided for the payment by the company of the costs of laying out and re-investing the purchase-money in such cases.

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[*23] *Mr. *Stratton*, for the petitioners, mentioned *Ex parte Northwick*,^(a) *Ex parte Trafford*,^(b) and *Ex parte Bishop of Durham*.^(c)

Mr. *Twells*, for the company, resisted the claim to the costs in question on several grounds: first, that it was altogether an unusual payment as between vendor and purchaser, and therefore only to be directed under some special legislative provision; secondly, that such costs were not contemplated by, and were not within the clause of the act which prescribed what costs were to be borne by the company; and, thirdly, that this was, in fact, proved by a later act the company had obtained, enabling them to provide a station in the parish of St. Olave,^(d) which expressly enacted that the company should pay the reasonable costs and expenses attending the valuation of the lands, and making out, establishing, or proving the claim of the vendors thereto, and of the investigation, deduction, and verification of the title on the part as well of the seller as of the purchaser. This act might be considered as tantamount to a legislative declaration, that the former acts did not comprehend any provision for such costs. Fourthly, that many similar applications had been made to the court under other railway acts, containing like enactments with regard to costs, which had been refused; and, lastly, that the expenses, if any, which were thrown upon the vendors, by the necessity of making out their title, was an incidental damage suffered by them, owing to the compulsory taking of the land, and as such damage, (where it arose,) it was usual to give it in evidence before the jury, in order that it might be included in the gross sum to be awarded to the vendor.

The probability, therefore, was, that the money in court
 [*24] *comprehended the expenses which the feoffees now asked for.^(d)

VICE-CHANCELLOR.—The company were empowered by the

(a) 1 Y. & Coll. 166.

(b) 2 Y. & Coll. 522.

(c) 3 Y. & Coll. 690.

(d) 3 & 4 Vict.

(e) No affidavit was filed to show whether this was or was not the fact.

1843.—*Ex parte the Feoffees of Addies' Charity, in re London & Greenwich R. Co.*

act to purchase lands of persons and bodies, many of whom were otherwise incapacitated to sell, and the act prescribes the way in which the price of the land is to be ascertained, and expressly directs, that "all such contracts, sales, and conveyances shall be made at the expense of the said company." In this case, the company contracted with the petitioners for the purchase of part of their lands, the price was fixed by a jury, and the conveyance was executed in the form which the act points out. The company, having taken the land, called on the vendors, as they had a right to do, to make out their title; the title was made out, and that occasioned some expense. The sole question now made is, whether the vendors are entitled to the particular costs so incurred,—the company admitting that they are bound to pay the other costs. Against the liability to the costs in question, it was argued, first, that making out the title is not comprehended in the words "contract, sale, and conveyance;" and, secondly, if that was doubtful upon the construction of the words, a subsequent act which had been passed was so worded as expressly to comprehend the costs of the vendor in deducing the title, and therefore the former act was not so framed as to include them. I do not by any means accede to the latter argument. The first railway acts were, in many respects, vaguely expressed, and it was necessary to extend their provisions in several ways; but, if the words in the first act are large enough to comprise *these costs, it cannot [*25] be that the subsequent act has the effect of depriving the vendors of them. The sole question is, whether the words of the first act are large enough to comprehend the costs of making out the title. It certainly seems to me clear that they are. Why would not the word "contract" alone have been sufficiently comprehensive for that purpose? If, in an ordinary case between vendor and purchaser, it was part of the contract that the costs of the contract should be paid by the purchaser, that stipulation would entitle the vendor to costs of this description; for, in completing a contract to sell an estate, making out the title of the vendor is a necessary part. If a bill were filed, a court of equity would, I have no doubt, say, if the purchaser agreed

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to pay all the expenses of the contract, he must pay these costs also.

Supposing there to be any doubt on the word "contract" alone, what is the effect of the words "sales and conveyances?" The parties must necessarily have contemplated that some expense would be occasioned by making out the title: to say that that expense must be borne by the vendors, would be to act in direct contradiction to the terms of the act under which the parties have proceeded, and which, in fact, constitutes the contract or part of the contract between them. I must hold, in the words of the act, that the expenses of the contract, sale, and conveyance, which, according to my interpretation, comprise every expense necessarily incidental to the completion of the contract, are to be paid by the purchasers.

[*26]

*LEWIS *v.* THOMAS.

1843: March 11.

A. T., a person of unsound mind, living in the family of M. D., became entitled as heiress-at-law to certain lands. M. D. received the rents and profits of such lands for thirteen years during the life of A. T., and eleven years after her death, when M. D. died. M. D. had procured A. T. to execute a will devising part of her estate, and also indentures for conveying other parts, to M. D. and her heirs.

Held, that M. D. had founded her title upon the instruments which she had procured A. T. to execute in her favor; that her claim to the lands in question must be deemed to be under, and not against A. T.; and that there was, therefore, no adverse possession as against A. T., or those claiming under her.

That procuring instruments of conveyance and devise to be executed by a person of unsound mind was a fraud within the statute 3 and 4 Will. IV., c. 27, s. 26:—
Seemle,

That, after issues had been directed, on motion, to try the validity of the instruments executed by A. T., and whether she was of sound mind, the order being submitted to, it was no longer open to those claiming under M. D. to insist, at the hearing, that the claim of the heirs of A. T. was barred by the statute of limitations, 3 and 4 Will. IV., c. 27.

THOMAS DAVIES died in 1811, intestate, being at the time of his death seised, to him and his heirs in fee-simple, of lands in

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the county of Glamorgan, subject to a term of 1000 years, created by way of mortgage, and entitled for an equitable estate to lands copyhold of inheritance, according to the custom of the manor of Coity Wallia, in the same county, subject to a mortgage to E. Evans, to secure which the premises had been surrendered to a trustee to the use of the mortgagee, and also entitled to other lands copyhold of inheritance, according to the custom of the manor of Ogmores, in the same county. Thomas Davies left Thomas Bennett Davies, his son and heir-at-law, and heir according to the custom of the manors, and Mary Davies, his widow, who was entitled to her freebench in the copyhold lands of the manor of Ogmores, and to her dower of the freehold estate, subject to the mortgage term. The rents and profits were received either by Thomas Bennett Davies or Mary Davies until November, 1815, when Thomas Bennett Davies died intestate, leaving Alice Thomas, the sister of his paternal grandfather, his heiress-at-law, and heiress according to the custom of the several manors.

Alice Thomas had resided in the family of Thomas Davies for many years before his death: and after his death she continued, during all the remainder of her life, to reside with Mary Davies, his widow. It appeared that the rents and profits of the freehold and copyhold premises were received by Mary Davies, after the death of Thomas Bennett Davies, until her own death, and were never received by Alice Thomas, except in so far as Mary Davies might have applied them or any part of them for the use of Alice Thomas. [*27]

Under a power of attorney, dated the 8th of April, 1818, signed with the mark of Alice Thomas, and expressed to be executed by her, in consideration of her love and affection for Mary Davies, the reversionary interest of Alice Thomas in the copyhold premises of the manor of Ogmores, subject to the freebench of Mary Davies, was surrendered at a court baron of the manor holden on the 21st of May, 1818, to the use of Mary Davies and her heirs. E. Evans, the mortgagee of the copyholds in Coity Wallia, being in 1827 paid off by D. Jones,—by an indenture dated the 25th of January, 1827, also signed by Alice Thomas, and to which E. Evans, Mary Davies, D. Jones, and the trustee were

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also parties, the mortgage of Evans was transferred to Jones; and in consideration of the said payment by him, and also in consideration of the regard and affection which Alice Thomas had for her niece-in-law Mary Davies, Alice Thomas thereby covenanted to surrender the said copyhold premises to the use of D. Jones and his heirs, subject to the equity of redemption of the same; and D. Jones covenanted, that, on repayment of the mortgage-money and interest, he would surrender and reconvey the premises to the use of Alice Thomas and her assigns for life, and after her decease to the use of Mary Davies and her heirs; and it was thereby covenanted, that in the meantime the said Alice Thomas should continue seised thereof, subject to such trust. At a court baron, holden the 9th of July, 1827, the premises were surrendered by the trustee, and D. Jones was admitted tenant of the premises pursuant to the indenture.

[*28] *Alice Thomas died in January, 1828, leaving the plaintiff Jane Lewis and the defendant Martha Gower her co-heiresses at law, and co-heiresses according to the custom of Coity Wallia, and the plaintiff Jane Lewis alone co-heiress according to the custom of Ogmora.

In October, 1838, Mary Davies proved in the Ecclesiastical Court an instrument, dated the 20th of February, 1818, attested by three witnesses, purporting to be the will of Alice Thomas, whereby she devised all her freehold and copyhold lands and hereditaments in the county of Glamorgan to her niece-in-law Mary Davies, her heirs and assigns, and appointed Mary Davies her executrix.

Mary Davies died in December, 1839, having by her will devised the said freehold and copyhold lands to trustees in trust for the separate use of Sarah Thomas for her life, with remainders to the children of Sarah Thomas, subject to an annuity which she bequeathed to J. Llewellyn.

The bill was filed in September, 1840, by Jane Lewis, against the devisees of Mary Davies and the annuitant under her will, and against D. Jones and Martha Gower, stating that Alice Thomas had been for many years, and long before the death of Thomas Davies, of unsound mind, alleging various facts in proof thereof, and praying that the will, power of attorney, and

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assignment might be declared to be fraudulent and void, and that the surrenders of the said copyholds might also be declared void and of no effect, and that the pretended will and other instruments might be delivered up to be cancelled, and praying other relief consequential on such declaration.

Sarah Thomas and her children, the devisees under [*29] the will of Mary Davies, denied the alleged insanity of Alice Thomas, and by their answer submitted, that it appeared by the statements of the bill, that the alleged right of the plaintiff, so far as related to the freehold estate, accrued in the year 1811, on the death of Thomas Davies, and had therefore been effectually barred by lapse of time, and by the effect of the statute for the limitation of actions and suits; (a) and as to such of the copyhold or customary hereditaments as Thomas Davies was entitled to for an estate of inheritance according to the custom of the manors respectively, but which, as to the legal estate, were vested in trustees, they submitted, whether, his estate therein being merely equitable, any right of freebench, or in the nature thereof, attached to such equitable estate, and whether the alleged right to such estate did not also accrue on the death of Thomas Davies, and was not in like manner barred.

1842: *June 2*.—After the answers of all the defendants were put in, the plaintiff moved that issues might be directed to be tried for the purpose of determining the questions raised upon the validity of the instruments impeached by the suit. (b) Upon this motion, the Master of the Rolls ordered that the parties should proceed to a trial at law in the Queen's Bench, at the next assizes for Glamorgan, upon the following issues, viz. :—first, *devisavit vel non*, under the will of Alice Thomas, in &c., dated the 20th of February, 1818 : secondly, whether Alice Thomas ever executed the deed-poll or power of attorney of the 8th day of April 1818, in &c. ; and, if she executed the said deed-poll or power of attorney, whether she was of *sound mind at the time [*30]

(a) 3 & 4 Will. 4, c. 27, s. 2.

(b) See *Fullager v. Clark*, 18 Ves. 481 ; *Kent v. Burgess*, 11 Sim. 361 ; and *Golden v. Ulyate*, Id. 372, 377, and other cases there cited.

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she executed the same: thirdly, whether Alice Thomas was of sound mind at the time of the execution of the indenture of the 25th of January, 1827, in &c., and fully understood the contents and effect thereof; and, fourthly, whether the said deed-poll of the 8th day of April, 1818, and the said indenture of the 25th day of January, 1827, or either and which of them, were or was obtained from Alice Thomas by fraud.

The learned Judge (Sir R. M. Rolfe) before whom the issues were tried, certified the fact of such trial, and the finding of the jury on the several issues, as follows:—On the first issue, that Alice Thomas did not devise by her will, dated the 20th of February, 1818, in the said issue mentioned. On the second issue, that Alice Thomas did execute the deed-poll or power of attorney in the said issue mentioned, dated the 8th of April, 1818, but that she was of unsound mind at the time of the execution thereof, and had been of unsound mind for the last thirty years of her life. On the third issue, that Alice Thomas was of unsound mind in the month of January, 1827, and at the time that she executed the indenture in the said issue mentioned, and that she did not fully understand the contents and effect thereof. And, on the fourth and last issue, that the said deed-poll or power of attorney, and indenture in the said issue respectively mentioned, were both of them obtained from Alice Thomas by fraud.

The plaintiffs, after the trial of the issues, went into evidence to prove the execution of the several instruments by the parties, and the surrenders and admittances on the court-rolls of the manors. The defendants entered into no evidence.

March 11th.—The cause came on for hearing.

[*31] *Mr. *Roupell* and Mr. *Speed*, for the plaintiffs.

Mr. *W. J. Tayler*, for the devisees in trust, and the cestuis que trust under the will of Mary Davies.

The finding of the jury on the issues precludes these defendants from founding their title upon the will of Alice Thomas, or upon the effect of the other instruments in question. The de-

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fendants are therefore thrown back upon their title under the statutes of limitation.

The question then is, whether there has been such an adverse possession by the defendants and those under whom they claim, that they have acquired a title which the court will not disturb. Now, it appears by the bill, that Mary Davies entered into possession of the premises in question (excepting the copyholds in Ogmore, in which she had freebench) either at the death of Thomas, her husband, in 1811, or Thomas Bennett, her son, in 1815. Assuming the latter date (as the most favorable to the plaintiffs) as the time when the right of entry or action accrued to Alice Thomas, with respect to the freehold lands and the copyholds in Coity Wallia, and taking the finding on the second issue to be conclusive on the fact that Alice Thomas was under the disability of unsoundness of mind until her death in 1828, it appears that thirteen years had then elapsed; and from her death until the death of Mary Davies, in 1839, a further period of eleven years elapsed: these two periods make together twenty-four years of adverse possession. The right of entry or action is therefore barred; for the saving of the statute,^(a) after twenty years has expired, extends only to "ten years next after the time at which the person to whom such right *shall [*32] have first accrued," "shall have ceased to be under any such disability, or shall have died:"^(b) *Doe d. George v. Jesson.*^(c) To avoid the operation of the statute, the plaintiffs suggest that the acts of Mary Davies are a fraud, and that the same were unknown to the plaintiffs until their own title accrued, and therefore amount to that concealed fraud against which it is the object of the 26th section to guard: that clause, however, refers to a possession originating in fraud, and referable only thereto. In this case there is nothing to show that the fraud of Mary Davies (if there were any) was the means of upholding her possession even for an hour. The impeached instruments were entirely collateral to the possession of Mary Davies; her title did not receive, and does not stand in need of, aid from them.

(a) 3 & 4 Will. 4, c. 27.

(b) Sect. 16.

(c) 6 East, 80.

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VICE-CHANCELLOR :—The effect of an issue directed upon an interlocutory proceeding is not necessarily to conclude the parties upon the fact to which the issue relates. The parties, unless bound by any special undertaking, (which Lord Cottenham, in *Gompertz v. Ansdell*,^(a) seems to consider that it would be proper to require,) may enter into evidence in this court for the purpose of supporting or displacing the facts found upon the trial of the issue. The course taken in *Gompertz v. Ansdell* shows that an issue so directed is not necessarily final. In that case it was left open to this consideration,—that the issue might have been directed exclusively for the purpose of determining the motion, and not with the view of laying once for all foundation for the judgment of the court at the hearing. But in

[*33] *this case there is no doubt as to the object of the issues :

it could only be with a view to the ultimate decision of the question in the cause. The issues have been tried, and the defendants admit, or, at least, do not now question the propriety of the verdict. I must, in such circumstances, treat the issues as having the same effect as if they had been directed by the decree at the hearing of the cause ; and in that point of view the question is, what effect is now to be given to the proceedings which have been had in the cause ?

With regard to the point raised upon the statute of limitations, I am clearly bound by the order which the court has made in the cause. The defence founded upon the statute was insisted upon by the answer. The case of the plaintiff was, that the statute was no bar to the demand of the heir-at-law or customary heir. It is impossible to suppose that issues of this nature could have been directed, if the question upon the statute had not been decided. If the defendants could maintain their possession on the ground of the statutory bar, the facts to be tried by the issues would, at least so far as concerned any question between the plaintiff and the defendants, be perfectly immaterial. I cannot do otherwise than hold that the court, in directing these issues, did in effect decide that the statute of limitations constituted no bar to the suit.

(a) 4 Myl. & Cr. 449.

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Looking at the case on the merits, I have not the slightest doubt of the justice of the decision, which determined that Mary Davies did not acquire an adverse title to any part of this property; nor have I any doubt that I should have come to the same conclusion if the question had been now open for my decision. It would have been greatly to be lamented if the law had permitted Mary Davies, under such circumstances, to have *acquired a title to the property. She has herself, [*34] as appears by the instruments in question in the suit, put her title upon those instruments. Those deeds are conclusive evidence that she did not claim against, but, on the contrary, that she claimed under, Alice Thomas: they are direct acknowledgments of the title of Alice Thomas: (a) it is not a case of adverse possession.[1] I do not know whether the Master of the Rolls had under his consideration the question whether the case was or not one of concealed fraud within the meaning of the statute, but I think I should have had no difficulty in concluding that it was such a case.

I think the case of the plaintiff is completely established by the verdict.

Decree according to the prayer of the bill.

(a) See 3 & 4 Will. 4, c. 27, s. 14.

[1] Where one took possession of unoccupied land as contractor, to transport for the government to and from a fort on the frontiers, and that his claim comprehended the fort itself, as well as the land around it, and that his improvements were necessary in the performance of his contract, these circumstances were considered evidence that he did not hold in hostility, but in subordination to the rights of the crown. *Jackson ex dem. Sparkman v. Porter*, 1 Paine C. C. R. 458.

1843.—Slade v. Rigg.

[*35]

*SLADE v. RIGG.

1843 : 6th and 27th June.

The mortgagee of a reversionary interest in stock in the public funds, with a power of sale, may bring his bill for foreclosure ; and is entitled to a decree in the common form for an account, and in default of payment, for foreclosure.

Trustees appointed to sell a reversionary interest in stock, and pay off a mortgage thereon, and hold the surplus for the mortgagor, are not necessary parties to a bill of foreclosure brought by the mortgagee.

By an indenture, dated the 3d of June, 1839, J. Feaver assigned all and every the parts or shares, part or share, whether in possession, reversion, remainder, or expectancy, to which he the said J. Feaver had become entitled of or in the sum of 5000*l.* bank stock, and also of or in a certain accumulating fund thereinbefore mentioned, unto the plaintiff, his executors, administrators, and assigns, to and for his and their own use and benefit, but subject, as to the said part or share of or in the said sum of 5000*l.* bank stock, to the charges made thereupon thereinbefore recited, and subject, as to all the premises thereby assigned, to the proviso or agreement therein contained for the redemption of the same, upon payment by the said J. Feaver, his executors, administrators, or assigns, of the sum of 990*l.* and interest, together with any further advances as therein mentioned ; and it was provided, that in such case the plaintiff, his executors, administrators, or assigns, should re-assign the said premises unto the said J. Feaver, his executors, administrators, or assigns, or as they should direct : and in default of payment as therein mentioned, the plaintiff was thereby empowered to sell the said share or premises. J. Feaver soon afterwards died. The defendant Anne Maria Rigg was his administratrix ; and in December, 1841, as such administratrix, she created, by indorsement on the said indenture, a further charge on the stock thereby assigned, in favor of the plaintiff, for 261*l.* and interest. The principal moneys and interest were not paid at the stipulated time.

The defendant Anna Maria Rigg and her husband
[*36] *subsequently assigned their shares and interests in the same stock to Cave and Stuckey, as trustees, upon trust,

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by sale, to pay the debt due to the plaintiff, and the charges and expenses therein mentioned; and to pay the surplus to the defendants Rigg and wife.

The plaintiff filed his bill against Rigg and his wife and Cave and Stuckey, praying that Rigg and his wife might be decreed to pay what was due to the plaintiff, on taking the account thereby sought, and costs, by a short day, the plaintiff offering thereupon to assign and release the said mortgaged premises unto Anna Maria Rigg, or as the court should direct; and in default, that the defendants Rigg and his wife, and each of them, and all persons claiming under them or either of them, might be foreclosed, and that the defendants Cave and Stuckey might be declared to be trustees of the said mortgaged premises for the plaintiff absolutely, and be directed, if necessary, to assign and release the same accordingly. The facts were not in dispute. At the hearing,

Mr. *Koe* and Mr. *Berrey*, for the plaintiffs, asked for a decree of foreclosure: the interest of the mortgagee in the stock, although a vested interest, was not an interest in possession, and it was not probable that sufficient would be realized by a sale to pay the mortgage debt.

Mr. *Cole*, for the defendant Rigg, insisted that the mortgaged property was not of a nature to be properly the subject of foreclosure; that the mortgagee was only entitled to a decree for sale; (a) that the power of sale in the assignment expressly pointed to that remedy *alone for the recovery of the [*37] mortgage money, (*Dyson v. Morris*); (b) and that, having unnecessarily instituted a suit in which he could obtain no relief, beyond the sale that he might have had under his power without suit, the costs ought not to be added to the debt: *Sampson v. Pattison*. (c)

The trustees appointed for the purpose of discharging the incumbrances on the mortgaged property were in the situation of

(a) See *Ponten v. Page*, 1 Madd. Chan. Pr. 664, ed. 3.

(b) 1 Hare, 413.

(c) Id. 536.

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mere agents of the mortgagor, and ought not to have been made parties; *Walwyn v. Coutts*,^(a) *Garrard v. Lord Lauderdale*.^(b)

VICE-CHANCELLOR :—I have not been able to find a case in which a decree for foreclosure has been made of an interest in stock in any of the public funds; nor do I find, from the inquiries which I have made of the other judges of the court, that any instance of the kind has occurred within their experience. Among the forms of decrees collected by Mr. Seton, there is a precedent of a decree in a suit for the redemption of goods, which contains the ordinary direction, that, in default of payment by the plaintiff to the defendant of the amount found due, the plaintiff's bill is to stand dismissed with costs:^(c) this, in fact, operates as a foreclosure, and is, in that point of view, an authority for a decree for foreclosure, on a bill for that specific purpose; and I think the court, in a case like that, ought [*38] to make a decree of foreclosure. If *the reversion in the stock has a present value, the mortgagor may redeem; if it is valueless in the market as a subject of sale, justice requires that the mortgagee should have the option of taking it in specie, for the chance of what it may turn out to be worth in specie.

The only question then is, whether the circumstance, that the interest of the mortgagee, from the nature of the property, can only be equitable, excludes him from the right to the decree of foreclosure which he seeks. This question is answered by the cases which affirm the title of a second mortgagee to foreclose the mortgagor, although he does not redeem the first mortgagee, or take any steps to get in the legal estate. These cases decide, therefore, that the mortgagee of an equitable interest in property is entitled to foreclose the equity of redemption, leaving the legal title in a third party. I am of opinion that the plaintiff in this case is entitled in like manner to a decree for foreclosure of the mortgaged property in the ordinary form.

It appears that the mortgagors have assigned their reversionary interest in the fund by a subsequent instrument to trustees upon trust for sale, and out of the proceeds to satisfy the debt

(a) 3 Sim. 14.

(b) 3 Sim. 1.

(c) Seton on Decrees, pp. 181, 182.

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due to the plaintiff, and pay over the surplus to the mortgagors. This is a private arrangement of the mortgagors for their own benefit, which they might have cancelled at their own will and pleasure, and in which the plaintiff has no interest. These trustees ought not to have been made parties, and the bill must be dismissed as against them without costs.

*MALCOLM v. SCOTT.

[*39]

1843: 1st, 2nd, and 10th June.

A., in India, being indebted to B., in England, directed C. & Co., his agents in London, to hold a sum (equal to a lac of rupees) at the disposal of B., as soon as C. & Co. should be in possession of funds, and informed B. of such directions; C. & Co. also acquainted B. that they had received and registered the order. A. subsequently consigned a ship to another agent, D., and directed him to apply the proceeds of the sale of the ship to the purpose of paying the debt owing to B., and spontaneously informed B. that the ship and freight would be available for his (A.'s) London accounts, and that B., amongst others, would be paid the lac of rupees thereout.

Held, that B. had not, by the correspondence, upon which the plaintiff's case depended, acquired a lien on the proceeds of the ship, and that it was competent to A. to countermand the order to his agents as to the application of such proceeds to the payment of B.

Letters proved, but not particularly mentioned in the pleadings, are not therefore inadmissible; but if the production of such evidence would operate as a surprise on the other party, the Court will not give effect to it, without giving the party to be affected by it an opportunity of controverting it.

An injunction to restrain a defendant from parting with the property in question in the cause may be granted, notwithstanding a principal party interested is out of the jurisdiction.

On a supplemental bill, relief may be given of a nature different from that which was prayed by the original bill, where it proceeds upon circumstances arising out of subsequent dealings with the subject-matter of the original suit.

THE plaintiff G. Malcolm was a creditor of George Ure Adam and James Stewart Blakie Scott, who carried on business as merchants at Calcutta, under the firm of Adam, Scott, & Co. The original bill was filed in November, 1841, against that firm, and against William Scott, John Scott, and Peter Bell, who carried on business as merchants in London, under the firm of Scott, Bell, & Co.; and it charged that Adam, Scott, & Co. had directed the defendants Scott, Bell, & Co., who were their London

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agents, to appropriate a sum of 10,625*l.* (equivalent to a lac of rupees) to the use of the plaintiff, out of the first monies they should realize from consignments or remittances on account of Adam, Scott, & Co., and which Scott, Bell, & Co. promised to do ; and it prayed, with other relief, that an account as between Scott, Bell, & Co. and the plaintiff might be taken, and the proceeds of the consignments applied according to the alleged assignment.

After the answers were put in, the plaintiff filed his supplemental bill against Scott, Bell, & Co. ; William *Adam, of London, who was a brother of George Ure Adam ; and Adam, Scott, & Co., who were alleged to be out of the jurisdiction. The supplemental bill alleged that Adam, Scott, & Co. agreed with the plaintiff that the freight and proceeds to be realized from the sale of the ship "Forfarshire," on the completion of her voyage, should be applied as part of the funds of Adam, Scott, & Co. in or towards payment of the 10,625*l.*, and that they gave the plaintiff a lien or charge on the freight and proceeds for securing the same ; that the plaintiff, relying upon his lien or charge, abstained from taking, and did not take, such measures for enforcing payment of the 10,625*l.* from Adam, Scott, & Co. as he otherwise would have taken ; that "The Forfarshire" had been since consigned to William Adam ; that Adam, Scott, & Co. were attempting to withdraw the freight and proceeds from the operation of the plaintiff's lien or charge, and had instructed William Adam to dispose of the freight and proceeds, so as to defeat the plaintiff's lien or charge. The bill prayed a declaration that the plaintiff was entitled to have the share and interest of Adam, Scott, & Co. in the freight and proceeds of sale of the ship "Forfarshire," in the hands of William Adam, so far as he should receive the same, applied in or towards satisfaction of the 10,625*l.*, or otherwise of what was due from Adam, Scott, & Co. to the plaintiff ; that an account might be taken of such freight and proceeds ; that the amount thereof received or to be received by William Adam and Scott, Bell, & Co. respectively might be ascertained ; that the amount in the hands of Scott, Bell, & Co., applicable to the payment of the 10,625*l.*, or for which they were otherwise accountable to the

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plaintiff, in respect of consignments received by them from or on account of Adam, Scott, & Co., might be ascertained; that the sums which should be found to have been received by

William Adam and Scott, Bell, & Co., in respect of the [*41] freights or proceeds of "The Forfarshire," might be included as part of the amount applicable to the payment of 10,625*l.*: that William Adam might be decreed to pay what he had received in respect thereof to the plaintiff; and, if necessary, for the satisfaction of the 10,625*l.* pursuant to the order, if the ship had not been sold, that the same might be sold, and the proceeds applied accordingly: that Scott, Bell, & Co. might also be decreed to pay to the plaintiff what should be in their hands applicable to the payment of the 10,625*l.*, and that William Adam might be restrained from remitting the freight or proceeds of sale to Adam, Scott, & Co., and for a receiver. The plaintiff moved for the injunction.

The claim of the plaintiff was founded upon letters which had passed between Adam, Scott, & Co., their agents, and himself, and were principally disclosed by the answers. The letters are, for the most part, stated in the judgment. The other letters, on which more or less reliance was placed on the argument for the plaintiff in support of the motion, were the following:—Adam, Scott, & Co. to Scott, Bell, & Co., dated Calcutta, 16th January, 1841: "We are desirous of remitting Cs. Rs. 100,000 to Mr. George Malcolm, as if by a draft to-day, at 10 mos. date, at exchange 2*s.* 1½*d.* per Cs. Rs., 10,625*l.*, which would fall due in London 19th November next. Cs. Rs. 50,000 to you and Mr. W. Scott, for his loan to the writer. dated as above, at exchange 2*s.* 1½*d.*, 5,312*l.* 10*s.*; together, 15,637*l.* 10*s.* Should you be in possession of funds, we have to request the favor of your holding these sums at Mr. Malcolm's and your own disposal respectively."—J. S. B. Scott to G. Malcolm, dated Calcutta, 16th January, 1841, (after expressing his inability to say how their cash accounts stood, so as to regulate the remittance of the *plaintiff's stock, and that standing in his own name,) [*42] says, "Being anxious to make some funds available to you, I have written officially to Messrs. Scott, Bell, & Co., to hold at your disposal, on or before the 19th November next, 10,625*l.*,

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being the equivalent of Rs. 100,000, *exch.* 2*s.* 1½*d.* Our friends will hold this amount at your disposal, under discount, immediately after the receipt of this, or as soon as they are in possession of funds.”—Scott, Bell, & Co. to G. Malcolm, dated London, 12th March, 1841: “We beg to advise you, that by the overland letters from India, received yesterday, we are requested by Messrs. Adam, Scott, & Co. to account to you for the equivalent of Cs. Rs. 100,000, at 2*s.* 1½*d.* per rupee, 10 months after the date of their letter, (16th January last,) or to hold that amount at your disposal, under discount, at the Bank of England rates, if convenient to us, and provided we are in funds from their consignments and remittances via Colombo, China, and the Mauritius. At the present time we are considerably in cash advance for the firm, and the consignments and remittances hitherto advised will, we think, fall short of the engagements we are under on this account. We have, however, registered the above, and, should remittances or consignments come forward to enable us to meet their wishes, we shall lose no time in advising you.”—

On the 13th of March, the plaintiff requested Scott, Bell, & Co. to give their acceptances in respect of the remittance, which they refused. Several subsequent letters passed between the plaintiff and Scott, Bell, & Co. in the months of March, June, August, and October, 1841. in which the plaintiff pressed for a definite understanding with regard to the state of the account between Scott, Bell, & Co. and Adam, Scott, & Co., and the time at which payment to the plaintiff might be expected; and

Scott, Bell, & Co., on the other hand, alleged, that their [*43] balance against Adam, Scott, & Co. *was still very large, and they declined to do more than refer to their former intimation. In reply to a request of the plaintiff to know the true state of their claims on Adam, Scott, & Co., Scott, Bell, & Co., by a letter of the 23rd of October, 1841, said, “If you continue to be a partner in the present firm, we shall have the greatest pleasure in submitting all our subsequent accounts to you; if you are not, we do not acknowledge your right to ask for any particulars in regard to their transactions with us beyond what we have already, and shall continue cheerfully to give you, bearing upon the remittances that may be ultimately avail-

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able for the payment which the Bengal firm desire to make to you.”(a)

Mr. *Roupell* and Mr. *Rolt*, in support of the motion, contended, that the communications which had taken place between the parties had given the plaintiff a lien on the proceeds of “The Forfarshire,” (if not the freight) which Adam, Scott & Co. could not retract. It was not necessary in this court to make out, that the instructions which had been given by the principal were so conclusively accepted by the agent as to make the agent a debtor to the plaintiff; that would be a sufficient case at law:

Williams v. Everett : (b) it was sufficient to shew that the instructions were given, and were acted upon by the agent, and that those instructions were communicated to the creditor: *Burn v. Carvalho*. (c) All these circumstances occurred in this case, and created a trust or charge for the plaintiff which the court would enforce.

*Mr. *Koe* and Mr. *Hull*, for the defendant William Adam, [*44] insisted that the instructions contained in the letters might be, and had been revoked; that the supplemental suit deviated from the original suit, and was irregular; that the letters, except those of the 16th of January, 19th of November, and 22d of December, 1841, (d) were not charged in the bill, and were, therefore, inadmissible as evidence: *Whitley v. Martin*, (e) *Graham v. Oliver*, (g) and that the injunction could not be granted in the absence of Adam, Scott & Co.: *Browne v. Blount*. (h)

VICE-CHANCELLOR.—The plaintiff claims a specific lien upon the proceeds of the sale of the ship “Forfarshire,” now in the hands of the defendant William Adam, in satisfaction of a debt claimed to be due from the firm of Adam, Scott & Co. to the plaintiff. The defendants Scott, Bell & Co., whatever they may

(a) The remainder of the material correspondence will be found in the judgment; it is omitted in the statement to avoid repetition.

(b) 14 East, 582.

(c) 4 Myl. & Cr. 690.

(d) Pages 41, 48, 56.

(e) 3 Beav. 226.

(g) Id. 124.

(h) 2 R. & Myl. 83.

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have formerly done, do not now claim any interest in these monies, and the defendant William Adam himself claims no interest in them. The proceeding is in effect against Adam, Scott & Co., the Calcutta house, in their absence, except so far as they may be represented, or their interest protected, by William Adam.

The lien of the plaintiff upon the proceeds of the sale of "The Forfarshire," is founded upon an alleged contract, which is sought to be made out by means of a correspondence that has passed between the parties. In considering the effect of [*45] this evidence, I shall divide it into three branches: first, the letters which passed between the Calcutta house and William Adam; secondly, between the Calcutta house and the plaintiff; and thirdly, between the plaintiff and the defendant William Adam.

In considering the effect of this particular correspondence, it should be observed that the letters which passed in the early part of 1841 between Adam, Scott, & Co. and Scott, Bell, & Co.,—between Scott, Bell, and Co. and the plaintiff,—and between Adam, Scott, & Co., and the plaintiff, do not relate to any specific consignments whatever; and it cannot, therefore, be disputed that, at the time the correspondence I am about to notice commenced, Adam, Scott, & Co. were free to deal with "The Forfarshire," as they thought fit. And the questions upon the effect of their correspondence may be considered under two heads: first, whether the effect of the correspondence per se was such as to withdraw "The Forfarshire," from the control of Adam, Scott, & Co., and give the plaintiff the lien he claims, in the absence of an actual agreement to give such lien; and, secondly, whether, upon the correspondence it is not manifest that the plaintiff never supposed he had any lien upon "The Forfarshire," until he was advised by some one that he might possibly establish a lien by means of the correspondence.

The first branch of the correspondence is that between the Calcutta house and William Adam, who was their own agent; and if a lien could be made out by that correspondence alone, it might be material to consider which of these letters were sent, and which received, by particular posts. I agree to the observation on

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behalf of William Adam, that all letters sent by one post and received by one post must be considered and *treated [*46] as one communication. It might also be material to observe, that the letters, collectively taken, do not purport to give an absolute direction with respect to the application of the proceeds; but the Calcutta house thereby reserve the right to have part of the proceeds applied in satisfaction of the claim of other persons. I am satisfied, however, that this part of the correspondence is material only to the plaintiff's case, as it may assist in throwing light upon other parts of it. Nothing, I conceive, can be more clear than that instructions communicated by a principal to his own agent, to apply the property of the principal in payment of a particular creditor, do not per se give that creditor any lien upon the property in the hands of the agent: *Scott v. Porcher*.(a) I think it equally clear, that the mere announcement by a principal, even to his creditor, that such an arrangement had been made by himself for the payment of the creditor's debt, would not alter the case or give the creditor a lien:[1] for this authori-

(a) 3 Mer. 652.

[1] In order to constitute an equitable assignment, by a debtor to a creditor, of a sum due from a third person, there must not only be an agreement to pay the creditor out of the particular fund, but an appropriation of the fund, either by giving an order upon it, or by transferring it in such a manner that the holder will be authorized to pay it to the creditor directly, without the further intervention of the debtor. *Hoyt v. Story and The New York and Erie Railroad Co.*, 3 Barbour's Sup. C. Rep. 262. In the case of *Watson v. The Duke of Wellington*, 1 Russ. & Mylne, 602, the Master of the Rolls held, that in order to constitute an equitable assignment there must be an engagement to pay out of a particular fund. See also *Clark v. Mauran*, 3 Paige Ch. Rep. 373; *Bradley v. Root*, 5 Paige Ch. Rep. 632. That there must be something more than a mere agreement to pay out of a particular fund, see *Rogers v. Hosack*, 18 Wend. R. 319; *Hoyt v. Story*, 3 Barb. S. C. R. 262, 264. The rule seems to be, that unless there is some appropriation of the fund, either by giving an order upon it, or transferring it in such a manner that the holder would be authorized to pay it to the creditor directly without the intervention of the debtor, it would be held not to create a lien, but to be a mere personal covenant. See *Hosack v. Rogers*, 18 Wend. R. 319; *Hoyt v. Story*, 3 Barb. S. C. R. 262; *Brainard v. Burton*, 5 Verm. R. 97; *Mandeville v. Welch*, 5 Wheat. R. 277. In the case of *Hosack v. Rogers*, there was a covenant to pay a certain debt out of a designated fund, when the same should be recovered by the debtor. The Court for the Correction of Errors held that it did not give the creditor a specific lien on the fund. Judge Cowen, in that case, says—"Here is no assignment, no mortgage or pledge, no or-

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ty can scarcely be wanting ; but if it were, the case of *Ex parte Heywood*,^(a) a case in bankruptcy, and one, therefore, which involved the equity as well as the law of the case, the principle of the decision in *Garrard v. Lord Lauderdale*,^(b) and the explanation which is given by Lord Cottenham in *Bill v. Cureton*,^(c) of that and other cases of the same class, would remove all difficulty upon the subject. It is clear that, notwithstanding such direction or communication, the property may remain under the dominion of the debtor. I refer, therefore, to this part—only on account of the bearing it was said to have upon the other parts—of the correspondence out of which a contract might possibly be made out.

It appears originally to have been the intention of the [*47] *Calcutta house to consign the ship “Forfarshire” to Scott, Bell, & Co. for sale, and that the proceeds should, to some extent at least, be made available to the payment of the plaintiff’s debt. This intention was afterwards departed from,—as to the destination of the ship. On the 12th of September, 1841, Adam, Scott & Co. wrote to William Adam :—“By the last accounts from Macao not a ball of ours had been sold : Leighton had, however loaded ‘The Forfarshire’ for London with tea at 8*l.* 10*s.* per ton ; and as she will be sold at home, the proceeds of the freight and block should not be far short of 14,000*l.* or 15,000*l.* I am thinking of sending the power to you for this purpose, for it is more in your line, and you will do far greater justice than S., B. & Co., can or will.” The intention, however, on the part of the Calcutta house, that the proceeds of the sale should be made available for the payment of the plaintiff’s debt, appears to have continued after the change in the destination of the ship. On the 21st of October George Ure Adam writes to William Adam—“Malcolm has about 2500*l.* of A., S. & Co., and until the ‘Forfarshise’ gets home he cannot get a pice of his capital :” and he proceeds to intimate his intention to

der or other specific appropriation of the French fund, but a mere covenant to pay them over on their being obtained by the covenantor. That such an agreement does not create any lien either at law or in equity.”

(a) 2 Rose, 355.

(b) 3 Sim. 1 ; 2 R. & M. 451.

(c) 2 Myl. & K. 510, 511.

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transfer the ship into the name of William Adam, and to forward the bill of sale by the next mail. On the 20th of November the same partner wrote to William Adam, and, after informing him that the bill of sale conveying "The Forfarshire" to him had been executed, and would be sent by the next mail, adds,—
"You must use your best exertions to dispose of her, and let Malcolm have a portion of his capital. She was to sail from Hong Kong about the 10th ulto., if all her repairs were complete." On the 18th of December the necessary bills of sale and powers of attorney are transmitted to William Adam, enabling him to sell the ship, and the letter of Adam, Scott & Co. to him of the same date, notifying the *transmission of [*48] these instruments, contains this passage:—"We have no accounts from China of the final departure of 'The Forfarshire' for London"—"We hope that you will be able to effect a sale of the ship at 10,000*l.* or upwards; but we do not wish to limit you to 500*l.*, more or less, our desire being to get the ship sold, and the proceeds made available to Mr. George Malcolm." On the 18th of December, 1841, they again write,—
"With reference to our letter of the 11th instant, we beg to wait upon you with the under-mentioned policies of insurance on the block of the ship 'Forfarshire,' from the 15th instant to 15th March next, which, in the event of loss, you will please recover, and make the proceeds available, as before stated, to Mr. George Malcolm." Now, up to that time, there appears to have been a clear intention communicated by the Calcutta house to their own agents in this country that the proceeds of the sale of "The Forfarshire" should be made available for the payment of a portion of the capital of the plaintiff,—who appears to have been a former partner in the house,—the debt which he claimed being the capital owing from the firm on his retirement. To this time, however, there had been no communication whatever made by William Adam to the plaintiff of what is contained in these letters; and on the 22d of December George Ure Adam writes to William Adam, and referring to the other letters by the same mail regarding "The Forfarshire," adds,—
"When telling you to make the proceeds of the vessel, when sold, available to pay to Malcolm, you will understand that the matter will be conditional, and

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dependent on advices from me by next mail. I have no fear of funds coming from China, but until I get them it would not be just to pay Malcolm in preference." And the writer then goes on to express some grounds of complaint, which he sup-
[*49] poses himself to have, of the conduct of *the plaintiff towards him. Up to this point, therefore, there was nothing more than instructions sent by a principal to his own agent, directing him in what way he was to apply the property of the principal in satisfaction of his obligations; and before any communication was made to the creditors, there is a letter which says that the directions formerly given are to be conditional, and dependent upon future advices from the principal. If this letter, and the other letters of the same month, were received by the same post, and are to be taken as the same set of instructions, it is plain that any effect the former part of these instructions alone might have had is materially reduced by the latter part. But before any communication to the creditor, the agent is ordered to hold the proceeds according to the future direction of the principal.

It appears that, about this time, the plaintiff, not being satisfied with the progress of his attempts to obtain payment of his debt, sent out a Mr. Buchanan to India as his agent, to support, if not to enforce, the claim there. This step appears to have produced a change in the intentions of the Calcutta house; for on the 21st of January, 1842, George Ure Adam, writing to William Adam, says, "As to the state of our account with them (S., B., & Co.,) when they talk to you about it, you should ask to look at our statements: they have behaved very badly to refuse to give the information to Malcolm regarding what funds were indicated by us via Mauritius; and Malcolm has, on the other hand, acted very badly to me in sending out Mr. Buchanan, at the same time disputing several items in our accounts, as not coming within the province of our business, as if two partners could not control a third: it was my desire to let him have his capital—at least such portion as I thought we
[*50] might safely pay to him—with the shortest delay, *but since he has resolved to dispute our accounts, I will not pay him anything. Mr. Buchanan has called twice, and I told

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him that I had already made arrangements to pay Malcolm about 10,000*l.* out of the proceeds of 'The Forfarshire,' and that I considered Malcolm, under the circumstances, was dealing harshly towards me: he disclaimed this."—"Nothing has been done by Buchanan as yet, and he is waiting till the mail comes in with fresh instructions from Malcolm."—"I have got Turton's opinion privately that Malcolm cannot annoy me by calling for security or for the payment of any portion of a disputed partnership account, especially as there were no articles of co-partnership or deed of dissolution, so that, if he intends to give trouble by calling for his money, I shall meet him with unsettled dependencies. It was my wish to meet his desire to get his money with all possible dispatch."—"I doubt the propriety now of giving him any of his money in England, and I wish it were possible for you to raise 10,000*l.* on the block of 'The Forfarshire,' and send the money out at once to me, and thus leave the adjustment of all the partnership accounts here. As the vessel stands in your name, you can do as you like with her, and no one can arrest her or her freight. Scott, Bell, & Co. have a claim against Colly(a) for some balance due on shipments, and Richard Bell has written home that so much of the freight will be available to pay them for Colly's debt. Let the money due on shipments made by J. W. and W., S., B. for 5000*l.* be paid them from the freight, in the first place. If you can by any satisfactory way raise even 5000*l.* or 6000*l.* on the block, I wish you would do so and remit the amount, and the remainder when you sell the vessel." Again, on the 22nd of January, he wrote thus:—"Regarding Malcolm, I have told *him, that, as he has sent out a representative here, our [*51] correspondence will now cease; and that I regret there should be any difference existing between us. You will, of course, not give him any information regarding 'The Forfarshire,' for his account must be adjusted here. He will be anxious, perhaps, for some promise from you, but you cannot give him one: on the other hand, as I do not know but you might have paid him some money, Buchanan cannot call upon

(a) A part-owner of the ship, on whose interest nothing turned.

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me for a double payment, or even security, supposing that our partnership accounts were free from dependencies, but which they are not."

Many other letters were read, which were only important for this case, as showing in what way the Calcutta house was giving directions to their own agents. It is sufficient for me to say, that the result of these letters is, that, at the time I have mentioned, the Calcutta house, in their directions to their agents, countermand the authority they had formerly given, and direct that Malcolm shall have no part of the money in the hands of William Adam applied in payment of his claim, always acknowledging, however, that the plaintiff was a creditor; and nothing, as will hereafter be seen, had passed between William Adam and the plaintiff upon which the plaintiff can sustain his claim. This is the result of the correspondence down to the letters which advert to the institution of the suit.

Now this correspondence—no other communication being made to the plaintiff, by the agent, than appears in the third branch of it, to which I will presently refer—was nothing more than a direction given by a principal to his own agent; and, so far as the direction of the application of the proceeds of the ship went, was countermanded, before any communication, [*52] had been made by *the agent to the creditor, under which a lien, not given by the directions to the agent alone, could have been acquired by the creditor.

It is from the second branch of the correspondence,—that which passed between the Calcutta house and the plaintiff,—that the lien must (if at all) be made out, and to that end the correspondence must be shown to evidence an agreement between the Calcutta house and the plaintiff to give him the lien which he claims in this suit. I accede to the plaintiff's argument, that where there is—as in this case there clearly is—a good consideration for the lien, it is immaterial what may be the form of the transaction. It is only necessary that the transaction should be evidence of an agreement for a lien: the real nature of the transaction, and not the mere form of it, must, I

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apprehend, be regarded : *Bill v. Cureton* ;(a) which case I followed in *Hughes v. Stubbs*.(b)

The case of *Burn v. Carvalho*(c) was relied upon as an authority in the plaintiff's favor. In that case the creditors requested the debtor to order Rego, the holder of property of the debtor, immediately to hand over to the creditor's agent such property as Rego might have belonging to the debtor, equivalent in value to the amount of certain bills; in answer to which request, the debtor promised that he would write to Rego, and direct him to hand over to the creditor's agent property of the debtor to cover the amount of the bills which might not eventually be paid. Lord Cottenham describes this as the result of the state of facts before him,(d) and says,—“The question is, whether such promise and agreement would not give a lien in equity ;” and he decides that “the letters, contain- [*53] ing the request and the promise, amounted to an equitable assignment of the fund in the hands of Rego. That was a promise to pay out of a particular fund, in answer to an application for payment out of that very fund. I do not conceive that Lord Cottenham meant to decide anything more in that case, than that, where you make out the agreement to give the lien, the form of the transaction is not material.

Now, in this case, there is no agreement in terms; the plaintiff has alleged in the bill that there was an agreement giving him the lien which he claims, and he has endeavored to substantiate that allegation by the letters. I will assume, in favor of the plaintiff, for the present purpose, that the letters of George Ure Adam are to be taken as the letters of the Calcutta house, although, looking at the manner in which the acts of Scott, one of the partners, are sometimes spoken of, it is impossible to regard several of the letters otherwise than as, in truth, the private letters of George Ure Adam. The first of the letters to which I will refer is the letter of the 1st of September, 1841, written by the plaintiff to Mr. George Ure Adam, which is as follows:—“By this mail Mr. Dunlop is transmitting orders to Calcutta to

(a) 2 Myl. & K. 511.

(c) 4 Myl. & Cr. 690.

(b) 1 Haro, 476.

(d) Ib. p. 701.

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send home his funds, for the purposes of our contemplated co partnership. I have always represented to him and Anderson the certainty of the whole of my money in your hands being released and sent home to me at the close of the present indigo season, if not sooner. I presume there is no doubt I am right in this view : already, for some time, I have been at a stand-still in my business, and must yet continue so for months, in consequence of my capital being in your hands ; but I do hope that I shall be saved the disadvantage and humiliation of being without my quota of capital when Mr. Dunlop is placed [*54] here, at the extreme latest period *named by me for the payment of mine. I entreat you to write me by the first mail after receipt of this, with whatever remittance, much or little, you can send, and stating positively at what following date or dates I may calculate upon the whole remaining portion of my funds being despatched from Calcutta. Until I have your assurance when you will remit me in full, I cannot enter on the new partnership proposed, even if the others were consenting ; and, my being kept in entire inactivity and suspense, with the burthen of a commercial establishment, is becoming already a very serious matter. I wish it had long ago occurred to me to ask you to state the time at which I might depend on remittances being despatched." This letter was answered on the 19th of November, 1841 ; there were intermediate letters to which I shall refer. But, speaking of the letter of the 1st of September, with reference to the answer to it on the 19th of November, it is to be remarked, that it is not like the letter in *Burn v. Carvalho*, asking security for payment of the debt, still less asking for payment out of a specific fund ; it is nothing more than a request by the creditor to be informed when he may look for payment of his debt.

On the 15th of September, 1841, before the plaintiff's letter of the 1st September had been received, a letter was written from the Calcutta house to the plaintiff, in which this passage occurs :—"The ship 'Forfarshire,' by the last accounts from China, was laden for England with tea, and as her block and freight will be available for our London accounts to the extent of 14,000*l.* or 15,000*l.*, you will get, if you have not hitherto got,

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payment of the equivalent of the lac. Colly Kincar owns a third, and his power to sell will go home by the next mail. There is a dispute with the former commander, Captain Rapson, who has not executed a bill of sale for one-third share.

He must, however, give way, and before a month "I hope [*55] to get the share which he has sold to us transferred."

Now, that appears to me to be a very material letter to be considered in this case; it raises an important mercantile question; it is a letter not written in answer to any application for security, but is a spontaneous communication from the Calcutta house to their creditor, before the receipt of the letter of the 1st September, informing him that they have sent to their own correspondents a ship which would be made available for their London account; and that the creditor will from that source get, if he has not already obtained, payment. The conclusion to which I have come, without hesitation, upon consideration of the authorities, is, that the communication of that fact, if nothing more had passed, would not have given the creditor a right in this court to have the fund in the hands of the agent impounded towards satisfaction of the debt. It was nothing more than an intimation that the debtor had made arrangements by which the creditor might be benefitted, but which left the fund indicated entirely in the hands of the debtor, so far as respected its application as a part of his London account. A creditor could no more acquire a lien upon the property, withdrawing it from the control of the debtor, by force of such a communication only, than he could acquire a right to have a receiver appointed over real estate, because the owner spontaneously informed him that he intended that his Christmas rents should be applied in payment of his debts, including that of the particular creditor.

On the 21st of October, (still before the plaintiff's letter of the 1st September was received,) another letter was written from Calcutta to the plaintiff, which, after some remarks on the general state of their account, proceeds,—“Until ‘The Forfarshire’ be realized, there will be no funds available to pay up any of your *capital; and surely, if I am not able to pay [*56] Messrs. Binney & Webster for their advances on ship-

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ments, you cannot expect that I can find the means to honor bills from England." And the writer concludes,—“In fact, I have no means of paying you, as I said before, until ‘The Forfarshire’ be sold.” This letter appears to me to go somewhat further; it refers to other creditors and their claims as being prior to that of the plaintiff. There are similar communications to the effect, that arrangements are made to make the proceeds of “The Forfarshire” available to the payment of the debt, but not intending to give any lien, neither agreeing or promising to do so; and, unless I entirely mistake the law of the case, not in effect, giving any lien.

I now come to the letter of the greatest importance to the case,—that of the 19th of November, 1841,—which is the answer to the letter of the 1st of September, by which the plaintiff had asked when he might be paid. The writer says,—“First and foremost, regarding your capital, I have so far anticipated your inquiry as to time, at least, for the greater portion, by the proceeds of ‘The Forfarshire,’ when that vessel is sold; at present, we have no positive intelligence of her having left China, and there is little prospect of her reaching England till the end of January. I would not have kept you a month, or even a day, out of funds, if I could have possibly remedied the evil, but I have been obliged to find funds to carry on the indigo factories, and to meet local engagements.” To understand this letter, we must see to what it refers. Now, all that had been done with respect to the proceeds of “The Forfarshire” was, the sending an instruction to the agent first to make it available to pay a portion of the plaintiff’s capital; and before that was communicated to him, the order was countermanded as regards

him. This letter was received in the meantime, merely
[*57] *telling the creditor that such an arrangement had been made. The last letter to which I shall refer, on this head, is that of the 9th of February, 1842, from George Ure Adam to the plaintiff:—“Regarding your capital and its payment, my previous letters will have made you aware of my position, and the mode in my power of making as much as I could early available to you.” There is then a complaint of the course taken by the plaintiff in drawing bills on Adam, Scott & Co.,

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and an expression of the anxiety of the writer to send home remittances; and he then goes on:—"But, as I said before, how can you expect any portion of your capital when Mr. Binney and Mr. Webster have not yet been paid the advance of 5000*l.* on the copper? In another month I hope to see all the China accounts closed, and that I shall then be able to make a further, remittance to London, in addition to the contemplated mode of making the proceeds of 'The Forfarshire' available to you; but, if you are pressing, it will only cause Messrs. Binney & Webster to insist upon your having no preference shown to you, and defeat the object of an early settlement with you of the greater portion of your capital that will be due to you."

I have looked narrowly through the rest of the correspondence for any letter written by the plaintiff, either to the Calcutta house or to any of the other parties, showing that he denied the Calcutta house to be in that position with respect to the proceeds of "The Forfarshire," which they here represented;—they tell him that some one else is to be paid before him; that, if he presses, he will only delay the payment of his own claims, and they speak of it merely as a contemplated mode of disposing of the proceeds. I do not, however, find any such letter; but if the plaintiff at that time had thought the former letter had given a lien upon the fund, the answer *would have been [*58] to this effect:—"You have already given a lien upon the proceeds of 'The Forfarshire;' what do you mean by speaking of this as a contemplated mode of payment, and of paying other persons in preference to me?" Instead of this, he acquiesces in their statement of the situation of the parties with respect to this fund: it very much resembles an admission on his part of that which I think is the effect of the former letters, that Adam, Scott & Co., had a right to apply the proceeds of "The Forfarshire" in the way they thought best.

But the letters which appear to me to put the truth of the case beyond all dispute are those which I have classed as the third branch of the correspondence, between the plaintiff and William Adam. These letters appear to me to be totally inconsistent with the notion, that, at the time they were written, the plaintiff considered he had any lien. The plaintiff, on the 7th

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December, 1841, writes to William Adam, and refers to a letter he had received from George Ure Adam, of the 31st of October and to the position and resources of the Calcutta firm, and adds :—"Do you know or hear anything of 'The Forfarshire,' from China? He (your brother) looks to that vessel and her freight as a source of payment to me." In the next letter from the plaintiff to William Adam, dated the 14th of March, 1842, he writes as follows :—"By the last overland I received from your brother a short private letter, which although not written in an unfriendly tone, indicates some disappointments and soreness at the steps I have taken with a view to the liquidation and settlement of my long outstanding claim on A. S. & Co. I am sorry there should be a momentary feeling of this sort on his part: I ascribe it to the irksomeness of his position generally, which was calculated to ruffle his temper; eventually he will

be satisfied, that in whatever I have done I have but [*59] yielded, "and that reluctantly and tardily, to the most obvious dictates of prudence, and, in part, to the force of necessity."—"How is it that 'The Forfarshire' and her freight come to you instead of S., B. & Co.? Is there any new disagreement between the parties?" I refer to this letter to show, that at this time the plaintiff had received a letter indicating dissatisfaction at the steps which he had taken; and he still continues to speak in these general terms of "The Forfarshire." On the 15th of March, William Adam answered the letter of the 14th by a private note, containing some general observations relating to the members of the firm and its affairs, but not containing any expression intimating an acknowledgment that the plaintiff had any interest whatever in "The Forfarshire." There is then a letter from George Malcolm & Co., (the plaintiff's firm) to William Adam, of the 14th of March as follows :—"Our advices from Calcutta by the last overland mail lead us to believe that you have received from Messrs. Adam, Scott & Co., instructions, in which we are materially interested respecting the ship 'Forfarshire,' whose arrival from China may be now daily looked for. Having had no communication from you on the subject, we take leave to inquire whether you have received such instructions, and to request, that, if you have re-

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ceived them, you will do us the favor to state the particulars for our information."

It has been insisted, on the part of the plaintiff, that the words in this letter, "in which we are materially interested," amount to an assertion on his part, that he had a pre-existing interest in the proceeds. I do not so understand the letter, and I think, from the letters which follow, it is impossible to believe that at that time the plaintiff believed a lien was given him by the previous correspondence. The answer of William Adam *on the 15th of March is:—"In reply to your [*60] letter which I have just received, I beg leave to state that I have not received any instructions by the last overland mail from Messrs. Adams, Scott & Co., in which you are materially interested, respecting 'The Forfarshire.'" The plaintiff, on the 17th of March, acknowledging Mr. Adam's letter of the 15th, says, "The information in it is so different from what we had reason to expect, that we conclude there must be a misunderstanding somewhere. It occurs to us that you may possibly be able to throw more or less light on the matter if we state particularly the purport of our Calcutta advices, with reference to which we addressed you on the 14th instant." Now, what are the grounds upon which the plaintiff states that he thought William Adam was to receive instructions in which he was interested? He does not refer to any of the letters of the Calcutta house, but to a letter from his own agent at Calcutta; for he proceeds thus:—"In a letter from Mr. Buchanan, dated the 19th January last, he tells us he had been assured by Mr. George William Adam, on the part of Messrs. Adam, Scott & Co., that they had consigned to you 'The Forfarshire,' with instructions to pay us a sum of money, to be realized therefrom, which, he says, they calculate will be more than 10,000*l.*, and probably 11,000*l.* or 12,000*l.* Mr. Buchanan adds, 'to my request that they should send you bills upon Mr. Adam, in London, or give you some sort of authority by which you might claim an interest in this ship, they said it was not necessary, as instructions had been already given to their own agent.' Perhaps these particulars from Mr. Buchanan's letter may suggest to you, and enable you to communicate to us, some explanation of the non-receipt by

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you of any directions from your brother or his firm, respecting a payment to us or to our Mr. Malcolm, from the source [*61] alluded to, in conformity with the representation *made to Mr. Buchanan to Calcutta. If you can help to clear up this matter, we are sure you will be willing to do so for the sake of all concerned, especially for the purpose of enabling us to avoid any inaccurate representation of the case, in what we shall have to write on the subject to Mr. Buchanan."

It is impossible to believe that the plaintiff at that moment supposed he had a lien by contract on "The Forfarshire." He does not say to William Adam, your brother, in a letter, has pledged the proceeds of "The Forfarshire;" but he says, "My agent, Mr. Buchanan, writes me, and says, that an arrangement has been made by the house there to give you instructions so to apply the proceeds;" yet at this time the plaintiff was in possession of all the information that he is now, and was in the position to have made the claim if it existed. William Adam replies on the 21st of March, and says, that he had considered the question to relate to letters received by the last mail; that, as to letters generally, he had received from Adam, Scott, & Co., on the 11th of February preceding, instructions as to the sale of the ship "Forfarshire," and the application of the proceeds; and that, at the same time (the letters being, as the answer states, received by the same post,) he was informed by his brother that those instructions were conditional, and dependent on advices from him by the succeeding mail. He continues, "I have since received a letter from him stating, that in consequence of your Mr. Malcolm having sent out Mr. Buchanan to Calcutta, who is disputing the accounts of Adam, Scott, & Co., the whole matters between them are to be adjusted there. You will, therefore, see that I must refer you for any further information which you may require to Calcutta." There are several other letters of [*62] the same tendency, to which I only refer as *showing that nothing had passed between the plaintiff and William Adam which could have given the lien claimed; but the letters I have read are material to show that the plaintiff relied upon the information he had received from Buchanan of the intention of the Calcutta house, and did not insist that any letter from the

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Calcutta house to him actually gave him the lien. It appears to me that there is nothing on any part of this correspondence to establish the lien which the plaintiff claims.

Something was hinted at about forbearance by the plaintiff to sue upon the strength of the correspondence. I do not think I should be justified in speculating upon such forbearance, unless the letters were such as to justify the argument; that is, unless they gave the plaintiff the lien he claims, or justified him in believing they were intended to do so. But I have already shown that the plaintiff did not so understand the letters; and his proceedings by the agency of Mr. Buchanan show there was no forbearance.

Looking upon this as a question of the greatest importance,—whether communications of this kind have the effect of giving a creditor a right upon a specific fund,—I have felt it my duty to go through all the correspondence for the purpose of showing in what way every part of it bears upon the question. In order that there may be no doubt of the grounds upon which I go, I shall notice also the objections which were taken on the part of the defendant to the application.

One ground was the absence of Adam, Scott, & Co., the parties really interested in the property,—and I was referred to the case of *Browne v. Blount* ;(a) that case *does not [*63] govern the present. If, where property in the hands of A. clearly belonged to B., it was held that, because the trustees of the property are out of the jurisdiction, A. may withdraw the property, it would open the door to great fraud. The property being in this country, and vested in William Adam, if the plaintiff's right had been made out, there would be no difficulty on that ground in granting the injunction.

Another objection was, that the letters principally relied upon were not charged in the bill, and it was urged that they were, therefore, inadmissible. The cases of *Whitley v. Martin*(b) and *Graham v. Oliver*(c) were cited, to which I have very often been referred: they appear to me to be cited for a proposition

(a) 2 R. & Myl. 83. See 2 Hare, 585.

(b) 3 Beav. 226.

(c) Id. 124.

1843.—Malcolm v. Scott.

much broader than Lord Langdale ever meant to lay down. It is very difficult to say that those particular cases could have been decided otherwise than they were ; but the marginal notes go much farther than the judgments. This bill, however, expressly charges that there was an agreement for giving the lien in question, and I am perfectly clear, according to the rule Lord Cottenham laid down, that whatever would be evidence of an agreement at law is evidence in equity, subject to this, that, if one party should keep back evidence which the other might explain, and thereby take him by surprise, the court will give no effect to such evidence, without first giving the party to be affected by it an opportunity of controverting it. The only observation I make as to the absence of the letters in the bill is, that, as this is a proceeding against parties abroad, I should have been very much disinclined to grant the injunction against them if I had

found the plaintiff had kept back letters which might have [64] been communicated to the parties in India, *and to which they might have given an answer. It is not undeserving of remark, that the only letter relied upon is that of the 16th of January, 1841, and the other letters are merely referred to generally, and are not stated as giving a lien ; they are adduced merely to support the general statement that a lien had been given. I do not, however, dispose of the case upon this narrow ground ; although, perhaps, I might, as a matter of pleading, have done so.

The third objection was, that the relief cannot be had upon a supplemental bill. There is nothing in that objection. The original bill states the letter of January, 1841, in which the plaintiff is informed that provision is made for payment of his debt out of certain consignments to be made to Scott, Bell, & Co., and the bill is filed, stating that consignments have been made to Scott, Bell, & Co., mentioning "The Forfarshire" amongst them, and seeking security for the payment. After the bill is filed, "The Forfarshire" arrives and is sold, and then the supplemental bill is brought against William Adam, stating that the proceeds are in his hands. Supposing, therefore, that the lien could have been made out, the bill is not improperly framed to give effect to it ; but I am of opinion that the lien has not

1843.—*Malcolm v. Scott.*

been established, and that the plaintiff is not, therefore, entitled to the injunction.

THE motion was afterwards renewed before the Lord Chancellor. See *Malcolm v. Scott*, *infra*.

**WOOD v. WOOD.*

[*65]

1843: April 25, December 6.

The testator bequeathed several legacies, and among others, to S. W. 14,000*l.*, "and to the latter gentleman's family 6000*l.*" S. W. had six children, all living at the date of the testamentary instrument, and at the death of the testator, and no other issue:—*Held*, that such six children were, as joint tenants, exclusively entitled to the legacy of 6000*l.*[1]

A CODICIL to the will of James Wood, dated in 1835,(a) contained bequests, among others, to "Samuel Wood of Cleveland Street, Mile End, 14,000*l.*, and the latter gentleman's family 6000*l.*"

The bill was filed by six children of Samuel Wood, claiming the legacy of 6000*l.*

Mr. *Tinney*, Mr. *Humphrey*, and Mr. *Baily*, for the plaintiffs, asked for the reference to inquire whether the plaintiffs were the only children of Samuel Wood, and submitted that his children, or other issue, were the only persons entitled to the benefit of the legacy: *Barnes v. Patch*.(b)

(a) This was the same instrument which was the foundation of the suit of the *Corporation of Gloucester v. Wood*, *infra*, p. 131.

(b) 8 Ves. 604.

[1] In *Robinson v. Waddelow*, 8 Sim. 134, the testator gave all the residue of his effects to be equally divided between his two daughters, and their husbands and families. The court rejected the words husbands and families, and held that the two daughters took the residue equally and absolutely. That where it is necessary to effectuate the evident intent of the testator, that words and limitations be transposed, supplied or rejected, it may be done. See *Pond et al. v. Bergh et al.*, 10 Paige, 140; *Deakins v. Hollis*, 7 Gill & Johns. 311.

 1843.—Wood v. Wood.

Mr. *Walker*, for the executors, submitted that the word "family" might, according to circumstances, be construed to include not only the children, but the father himself, or his wife: *M'Le-roth v. Bacon* ;(a) or those who would be entitled, as next of kin or parties in distribution, under the statute: *Cruwys v. Col-man* ;(b) *Doe d. Thwaites v. Over* ;(c) or the heir: *Doe d. Chat-taway v. Smith* ;(d) *Wright v. Atkyns* ;(e) or the children might be entitled to a limited interest only,—as for maintenance:

Woods v. Woods ;(g) or, upon the difficulty in attributing [*66] *the meaning to the word of the testator,(h) the expression with regard to the family might be rejected: *Robinson v. Waddelow* ;(i) or the gift might be void for uncertainty: *Doe d. Hayter v. Joinville* .(k) If effect be given to the bequest, on what principle could the brothers and sisters of Samuel Wood or at least his wife, be excluded from the description of his "family?"

The VICE-CHANCELLOR said, that there was no pretence for any claim to the legacy by collateral members of the family, as against lineal descendants of Samuel Wood; and that there being a distinct gift to Samuel Wood by the same instrument, his wife was not included in the term "family," for that would be in effect a second gift to the husband.

THIS court doth order that the master do inquire and state what children or other issue of Samuel Wood, in &c., and in the codicil to the will of James Wood, the testator, in &c., named, were living at the date of the said codicil; and whether any and what children or other issue of the said Samuel Wood were born after the date of the said codicil, and in the lifetime of the said testator. And whether any and which of such children or other issue, as aforesaid, is dead; and if any one or more of such children or other issue has died since the death of the said testator, then &c. [Inquiry as to their legal personal representatives:] and for the better &c.; but the aforesaid inquiries are to be without prejudice to any question in the cause.

July 12th.—The master found, that Samuel Wood was married to Elizabeth Cooper, spinster, on the 21st of November, 1812; that there had been issue of the said marriage seven children, and no more, viz. the six plaintiffs, and one child, who lived

(a) 5 Ves. 159.

(b) 9 Ves. 319.

(c) 1 Taunt. 263.

(d) 5 M. & Sel. 126.

(e) 19 Ves. 299.

(g) 1 Myl. & Cr. 401.

(h) 1 Myl. & Cr. 401.

(i) 8 Sim. 134.

(k) 3 East, 172.

1843 — Wood v. Wood.

only a few months, and was buried in 1826; and that the plaintiff Henrietta was married to the plaintiff J. Beavins, in July, 1842; and that there were no other children or other issue of Samuel Wood living either at the date of the *codicil, or born after the date thereof, and in the lifetime of the said testator, [*67] than the plaintiffs in the first cause, who were all then living.

December 6th.—Declare that, according to the true construction of the paper writing of July, 1835, in the pleadings mentioned, the word “family” must be deemed to mean children of Samuel Wood of Cleveland Street, Mile End; and that the plaintiffs in the said original suit, being the persons, by the master’s report, dated the 12th of July, 1843, found to have been the only children of the said Samuel Wood who were living at the date of the said paper writing, and at the death of the said testator, were entitled in equal shares, as joint tenants, to the sum of 6000*l.*, in the said paper writing mentioned; and the same several plaintiffs, other than the said Henrietta Sophia Wood and Lydia Matilda Wood, and also the plaintiff John Calvin Beavins, and Henrietta Sophia, his wife, formerly Henrietta Sophia Wood, electing to sever such joint tenancy,—let the defendants, Jacob Osborn and John Surman, the surviving executors of the will of the said James Wood (they admitting assets for the purposes hereinafter mentioned,) on or before the 30th day of December instant, pay to the plaintiff Mary Cooper Wood the sum of 1139*l.* 0*s.* 9*d.*, being the amount of the sum of 1000*l.*, with interest thereon at 4 per cent., from the end of one year after the death of the testator up to the said 30th day of December instant, after deducting the sum of 126*l.* 15*s.* 7*d.*, being the amount of legacy duty payable in respect of such 1000*l.* and interest; and the sum of 2*l.* 0*s.* 2*d.*, being the amount of income tax, payable in respect of such interest, making together the sum of 128*l.* 15*s.* 9*d.* Like direction as to the other plaintiffs; but direction to pay the several shares of the infants and married woman into court, to their separate accounts respectively. Costs of the plaintiffs to be paid by the defendants, the executors.

*HOLLAND v. BAKER.

[*68]

1842: November 15 and 16. 1843: June 24 and 28.

W., E., and J. mortgaged their interests under a residuary gift to B. as a security for the debt of W.; and E. and J. took a second mortgage on W.’s interest, to indemnify them against the consequences of their joining in the first mortgage. Afterwards W. assigned his interest in the same property to three trustees for certain scheduled creditors. On a bill by E. and J. against B., to redeem the mortgaged property:—*Held*, that the creditors named in the schedule were necessary parties, and were not sufficiently represented by the two surviving trustees alone.

That the circumstance that the trustees were parties, not only in that character, but also as being themselves creditors, did not render them sufficient representatives of the absent creditors, who were fifty-four in number; and especially, inasmuch as

1842.—Holland v. Baker.

one of the trustees had also another and distinct mortgage on the equity of redemption.

That the defect of parties was not supplied by a supplemental suit, bringing before the court a few of the other creditors, to which supplemental bill the trustees were not parties.

WILLIAM, Emma, and Jane Poulter were entitled in equal shares to the proceeds arising from the residue of the real and personal estates of W. Collins. William Poulter, in 1831, assigned his share of such residuary, real, and personal estate to the defendant Baker, by way of mortgage, to secure 4000*l.*, lent to William Poulter by Baker; and Emma and Jane also joined in the mortgage, and assigned their shares to Baker, for the same purpose; but it was provided that William's share should be first applied. William afterwards assigned his share of the same estate to Haines and Cole, to indemnify Emma and Jane from loss by the former assignment. William Poulter, by indenture, dated the 20th of January, 1832, assigned his share and interest under the will of Collins to three trustees, of whom the defendants Smallpiece and Haines were the survivors, upon trust, after payment of certain expenses and allowances, to apply the trust moneys (arising from a sale of William's said share, which, by a previous deed, they were empowered to make) in satisfaction and discharge of the several debts owing to his creditors, who were parties thereto of the third part, and set opposite their respective names in the schedule thereto, or so much thereof as such moneys would extend to pay; and after such payment, in trust for William Poulter, his executors, administrators, and assigns. In March, 1832, another assignment [*69] was made *to Haines and Gates of the several shares of William, Emma, and Jane, upon trusts for payment of the debt to Baker, and to satisfy certain other charges and incumbrances. In November, 1838, on the occasion of the intended marriage of Jane Poulter with the defendant W. P. Mellersh, Emma and Jane Poulter assigned their shares in the residuary estate to the plaintiffs, upon certain trusts for the benefit of Jane and her intended husband, and the issue of the marriage, and also for the benefit of Emma Poulter. After the marriage, the plaintiff tendered to Baker a certain sum for principal, interest,

1842.—Holland v. Baker.

and costs, and required an assignment of the mortgaged property. The bill was then filed, and prayed an account of Baker's debt,—a sale of William's share and interest, and application of the proceeds towards the payment of Baker, and of the surplus to indemnify Emma and Jane in respect of the mortgage,—that, upon payment of his debt, Baker might assign the shares of William, Emma, and Jane, or of Emma and Jane, to the plaintiffs, upon the trusts of the settlement; and the bill also prayed specific relief against Haines, Gates, Cole, King, and Smallpiece, as arising upon the instruments, and other transactions thereby stated.

1842: *Nov. 15th.*—The cause being at the hearing, on the production of the deed of the 20th of January, 1832, it appeared that the creditors, parties of the third part, were fifty-seven in number, and the total amount of the sums opposite their names was 6561*l.* Smallpiece appeared in the schedule to be a creditor for 3300*l.*, Haines for 316*l.*, and Jane Poulter for 520*l.*, all of whom were defendants. The other creditors were not parties.

On behalf of some of the defendants it was objected that the absent creditors were necessary parties.

**Nov. 18th.*—VICE-CHANCELLOR :—It is not necessary [*70] for the present purpose to enter further into the circumstances of the case than relates to the share of William Poulter in the estate of Collins. William having mortgaged his share to Baker, afterwards assigns the same property, subject to Baker's charge, to trustees, in trust for the benefit of the creditors, who should come in and execute a certain deed. Those creditors are to sign releases and give discharges, and the property is to be divided among them rateably. The deed contains several other provisions not affecting this question. It appears that many creditors came in and executed that deed. The bill is filed by the trustees of Emma, and seeks to redeem the property in respect of the interest which they may have in William Poulter's share, as an indemnity to them. To this bill they have made the trustees of the deed of January parties, but they have not

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made any of the creditors, in that character, parties. I do not mean to give any opinion upon the question whether it is necessary to have all those creditors parties, but I am clear that the suit cannot proceed in the present state of the record; for, not only are the creditors not made parties, but no reason is suggested on the record as to number or otherwise for omitting them. I have no doubt that the court would, in a proper case, consider a numerous body of creditors as sufficiently represented by a limited number, even where they are sought to be charged; but certainly, in a case like the present, the bill ought to state the reason that they are not made parties to the record.

To stand over, with liberty to amend the bill by adding parties, or by stating why persons proper to be parties are not made parties.

[*71] *The bill was amended by adding the following averment:—"that the indenture of the 20th of January, 1832, was duly executed by Smallpiece and Haines as creditors of William Poulter, and also by divers other persons, too numerous (being forty in number or thereabouts) to be made parties individually to this suit; and in case they were individually made parties to this suit, the same could not be effectually prosecuted."

The plaintiffs also filed their supplemental bill against four other creditors appearing in the schedule; namely, Woods, a creditor for 47*l.*; Stedman, 25*l.*; Moon, 11*l.*, and Clarke, 6*l.* Smallpiece and Haines, the trustees under the deed, were not made parties to the supplemental bill. The original and supplemental causes coming on,

June 24th.—Mr. Romilly and Mr. Bagshawe, for the defendants Smallpiece and Haines, the trustees under the creditors' deed, insisted that the supplemental bill, considered as a proceeding connected with the original cause, was defective, in that the trustees were not parties to it, but some of the creditors only. It was so constituted that it could not be regarded as supplying any defect in the original cause: the trustees knew nothing of the existence of the supplemental suit until it was opened at the hearing:

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Jones v. Jones,(a) *Bignall v. Atkins*,(b) *Feary v. Stephenson*,(c)
Dyson v. Morris,(d) *Jones v. Howells*.(e)

Mr. *Temple* and Mr. *Freeling*, for the plaintiffs, said that the original and supplemental causes were, in effect, but one suit,—no new matter was introduced. The *trustee had [*72] had an opportunity of answering the amended bill, and might have stated anything to show that the parties on the record did not adequately represent the scheduled creditors, but, they had not made any such case on the pleadings: *Greenwood v. Atkinson*.(g)

June 28th.—VICE-CHANCELLOR—[After stating the proceedings :] It was objected on the part of the trustees at the opening of the case that they were now, for the first time, aware of the existence of the supplemental bill, and they were instructed to state that was reason for believing that the creditors brought before the there court by that bill had not been properly selected, so as to represent the body of creditors. I should pay no attention to the suggestion, except for the purpose of showing what course the court ought to take when it sees that such a case may possibly, exist, but has not the means of knowing the truth. The question is, whether the trustees are necessary parties to the supplemental bill. For the purpose of trying that question, I entirely exclude from my consideration the fact that the trustees, who were parties to the original bill, were also creditors. I suppose it to be a case in which the trustees were in that character parties to the original bill, and that a supplemental bill has since been filed against a few of the creditors without the trustees. Now *prima facie* I take it to be the duty of trustees, being parties to a bill affecting the trust property, to insist that the *cestui que trusts* should be brought before the court. Trustees are not themselves owners of the property; they are, in a sense, agents for the owners in executing the trusts, but they are not constituted agents for the purpose of defending the owners against

(a) 3 Atk. 111.

(b) 6 Madd. 369.

(c) 1 Beav. 42.

(d) 1 Hare, 413.

(e) 2 Hare, 342.

(g) 5 Sim. 419.

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[*73] the adverse *claims of third parties in this court. It is the duty of trustees in such a situation to object that the owners of the estate are not before the court; and I think it is the right of trustees in that case to insist that the onus of resisting adverse claims shall be thrown upon the cestui que trusts, and not on themselves.

If, in this case, all the creditors had been parties to the supplemental bill, it is not necessary that I should give any opinion whether the trustees could successfully have objected that they were not themselves parties. The principle of the case of *Bignall v. Atkins*,^(a) before Sir J. Leach, is much broader than any I need have recourse to, for the purpose of showing that the trustees would not be necessary parties to such a bill. Without going to the extent of the principle of that case, I will (not to repeat what I have before said) refer to *Dyson v. Morris*,^(b) as expressing the grounds on which, if the creditors were all parties, I should probably consider myself bound to allow the cause to proceed, notwithstanding the trustees were not parties to the supplemental bill: in that case the trustees would have the means of knowing in court, as well as out of court, whether all the cestui que trusts were present. If they were not there, the trustees would discharge their duty to them by taking the objection; and if they were, the trustees would be liberated from the obligation of defending the interests of their cestui que trusts, who might protect themselves. There being no question as between the trustees and their cestui que trusts, the case, as it appears to me, might then be free from all difficulty. The cases of *Greenwood v. Atkinson*^(c) and *Bignall v. Atkins* go much further than that of *Dyson v. Morris*.

[*74] *In this case, however, the fact is, that all the creditors are not here. The plaintiffs seek to bring the cestui que trusts before the court sub modo only; and the question is, whether, upon a record so framed, I can hold that the creditors are sufficiently represented, where a few of them only are brought before the court, upon a record to which the trustees are not parties. I have said that it is the duty of the trustees

(a) 6 Madd. 369.

(b) 1 Hare, 413.

(c) 5 Sim. 419.

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to require that all their cestui que trusts should be before the court: if the court is to dispense with the presence of any number of them in order to avoid the inconvenience of bringing so large a body of creditors before the court, it seems of necessity to follow that the trustees of the property upon which the court is to act should be parties to that record, that they at least might be able to inform the court whether it is sufficiently framed with reference to the interests of the whole of the cestui que trusts, by the selection of those who, in the existing state of things, are in a position adequately to represent the interests of the body. I do not doubt that the court does allow a selected number to represent a numerous body of defendants, whose interests are sought to be adversely affected in a suit. Lord Eldon repeatedly said it might be done, if the purposes of justice required it; and Lord Cottenham, in *Attwood v. Small*,^(a) after saying that the right course was to bring all parties before the court, observed, that courts of justice are bound to have regard to the mode in which the affairs of mankind are conducted; and when, in consequence of the mode of dealing, it would be impossible to work out justice if the rule requiring all persons to be present were not departed from, it must be relaxed rather than be allowed to stand as an obstruction to justice. I shall not be in the least degree deviating from *that rule in this [*75] case by holding that, so far as the supplemental bill is concerned, the trustees ought to be parties, where a few of the creditors are chosen to represent the whole; and that the suit cannot, therefore, proceed unless it can be shown that the supplemental bill is unnecessary, and that the suit, in this respect, may be sustained upon the amended bill alone.

Mr. *Temple* and Mr. *Freeling* submitted, that the cause might proceed on the amended bill, which suggested the inconvenience of making so many persons parties. The trustees alone were, in fact, sufficient, with that suggestion, for there were no distinct interests to protect; their only duty was to receive the fund and distribute it amongst the cestui que trusts; there was no con-

(a) Not reported; but see 4 Myl. & Cr. 635—Per Lord Cottenham.

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flicting or alternative right of redemption. The trustees were the only parties who could redeem for the benefit of all the persons whom they represented: *Troughton v. Binkes*.^(a)

Mr. Romilly and Mr. Bagshawe, contra.

Newton v. Earl of Egmont,^(b) *Cocker v. Earl of Egmont*,^(c) and *Caverley v. Phelps*,^(d) were also mentioned.

The VICE-CHANCELLOR said, it would be often very satisfactory if the court could dispense with the presence of numerous parties, by permitting them to be represented by a few; but such a course could not be practically introduced without the strictest safeguards. The plaintiff in such cases must be at least [*76] required to state distinctly and particularly what the case was upon which he relied, as a ground for deviating from the general rule of the court, which required all parties to appear in proceedings by which their interests were to be affected. The statement upon the amended bill, addressed to this point, was far too meagre to satisfy the court of the difficulty of observing the general rule, or of the necessity of its relaxation. It might certainly appear that two creditors adequately represented a much larger number; for example, suppose the debts were 10,000*l.*, and the two parties were creditors for 9000*l.*, and all the others for the remaining sum only. Here it appeared, moreover, that Haines, one of the creditors, on the record, claimed an interest in the equity of redemption, distinct from his interest under the deed. His duty as trustee was to disregard that equity of redemption, and look only to the interests of the creditors who had the charge upon it; but his individual interest as owner of the equity of redemption might be materially different. While, therefore, on the one hand, it did not sufficiently appear that the case was one in which the general rule should be relaxed, enough did appear, on the other hand, to make it at least doubtful whether the absent creditors were properly represented by the parties before the court.

The cause was again ordered to stand over.

(a) 6 Ves. 573. (b) 5 Sim. 130. (c) 6 Sim. 311. (d) 6 Madd. 229.

1843.—Major v. Auckland.

*MAJOR v. AUKLAND.

[*77]

1843: July 18, 19, and 31. November 3 and 7.

An insolvent debtor cannot, on the mere allegation that the assignee in the insolvency colludes with a debtor to the estate, and refuses to sue, sustain a suit for a legacy which passed by the assignment of his estate and effects under the insolvency; although charging that the legacy, if recovered, will afford a balance after satisfying all his debts; and praying that the legacy may be paid either to the assignee or to himself; nor can the suit be sustained, even if the provisional assignee appear, and submit to be bound by the decree; for the provisional assignee cannot empower another party to sue for the insolvent's estate, except by allowing such other party to sue in his (the assignee's) name.

Whether, if the alleged collusion or refusal to sue were proved, the insolvent could sustain such a suit—*quære*?[1]

W. MAJOR, by his will, dated in 1808, bequeathed the residue of his personal estate to trustees, upon trust for his wife for her life, or widowhood, with remainder, as to certain parts thereof, for his son William, and as to other parts, after the death of his son John without issue, for his daughter Mary, and he bequeathed the residue in equal third parts to his said children, William, John, and Mary. The testator died in 1810, and his widow, the tenant for life, died in 1826. John, the son, being in prison for debt in the year 1829, presented his petition to the Court for the relief of Insolvent Debtors, and having executed the usual assignment of his estate and effects to Samuel Sturgis, the provisional assignee, obtained his discharge in January, 1830. No creditor's assignee was ever chosen. John, the son, died in 1833, leaving a widow and five children. The plaintiff, his widow and administratrix, filed her bill, in 1843, against the executor of the survivor of the executors and trustees appointed by W Major,—the other parties interested under his will,—and S. Sturgis, the provisional assignee, claiming interests under the will

[1] That creditors of an insolvent cannot maintain a suit respecting property, or rights alleged to have belonged to the insolvent, and to be vested in his assignee under the insolvent debtor's act, upon an allegation of collusion between the assignee and the party against whom the relief is prayed, see *Heath v. Chadwick*, 2 Phil. 650; *Yewens v. Robinson*, 11 Sim. 105. That the same rule applies to a suit for a similar object by the insolvent himself, see *Kaye v. Fosbrooke*, 8 Sim. 28; *Spragg v. Binkes*, 5 Vesey, 583; *Benfield v. Solomons*, 9 Vesey, 77; *Saxton v. Davis*, 18 Vesey, 72.

1843.—Major v. Auckland.

of the testator W. Major, partly by the express gift and partly by implication, and stating that all the share and interest of John in such part of the testator's estate as remained undisposed of was vested in S. Sturgis, the provisional assignee; that the debts of John, the deceased insolvent, were much less than the sums of stock therein-before claimed to be due in respect of the testator's estate; and that if the court should be of opinion that the specific *sums claimed properly belonged to the estate of the deceased insolvent, there would be a considerable balance coming to the plaintiff, as his administratrix, after payment of all his debts.

The bill also stated that the plaintiff had frequently by herself and her agents applied to S. Sturgis as such provisional assignee, and requested him to institute a suit for the purpose of establishing the right of the deceased insolvent to the said sums of stock, and to one-third of the residue of the testator's estate (if any) remaining undisposed of, but S. Sturgis had refused so to do; and that under these circumstances, the plaintiff was advised and submitted that she was entitled to institute this suit as such administratrix: that the defendant, the executor, also refused to pay or transfer the said sums of stock and the said residue to S. Sturgis or to the plaintiff. The bill prayed that the estate of the testator, W. Major, might be administered, and divided amongst the persons entitled thereto, and the said sums of stock declared to belong to the estate of John, the insolvent, and paid or transferred to the defendant S. Sturgis, as provisional assignee, or to the plaintiff, as administratrix.

The defendant, the executor, by his answer, after stating various matters in fact and in law by way of defence, said, that all the real and personal estate of John, the son, comprised in the said conveyance and assignment, was then, and at the time of the institution of the suit, vested in the provisional assignee; and that therefore, even if all the allegations in the bill were true, the plaintiff had no right to maintain the suit; and the defendant claimed the same benefit of the objection thereto as if he had pleaded the insolvency and assignment.

[*79] *The provisional assignee was served with the copy of

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the bill only, The cause coming on to be heard, and the objection of the insolvency being taken,—

July 19th.—The VICE-CHANCELLOR said, that as the suit was constituted, it would not be possible to make any decree for payment of the legacies to the plaintiff, the court not knowing whether the provisional assignee repudiated or adopted the proceeding, or what course he might deem to be for the benefit of the creditors of the insolvent to take.

The plaintiff asked that the case might stand over to afford an opportunity for the provisional assignee to appear.

July 31st.—Mr. *Follett* appeared for the defendant, the provisional assignee, who did not admit that he had refused to institute a suit: he said, that the interest of the insolvent under the will in question had not been inserted in his schedule: that he could not disclaim such interest, but he would submit that his rights therein should be bound by any decree the court might make in this suit.

Nov. 3rd.—Mr. *Willcock* and Mr. *Craig*, for the defendants, the executor, and others, objected, that it appeared the title of the plaintiff to the legacy in question (if any) had accrued prior to his insolvency, and that his interest in it had, therefore, passed to the provisional assignee by virtue of the assignment. The allegation of refusal by the assignee to sue did not enable the plaintiff to sustain the suit, although, if the fact were proved before the Insolvent Court, it might, perhaps, be a ground for the exercise of the jurisdiction of that court over the assignee to the extent of compelling him to allow the *plaintiff to [*80] use his name in the suit upon a proper indemnity: *Spragg v. Binkes*, (a) *Hammond v. Attwood*, (b) *Saxton v. Davis*. (c) The relation of an insolvent debtor to his assignee is very different from the relation of a party beneficially interested in the estate of a deceased person to the personal representative. If the personal representative will not proceed against a debtor to the es-

(a) 5 Ves. 583.

(b) 3 Madd. 158.

(c) 18 Ves. 72.

1843.—Major v. Auckland.

tate, the *cestui que trust* has no alternative but that of coming to this court ; but there is a court of competent, and for many purposes exclusive, jurisdiction, to which the insolvent debtor may, in a parallel case, resort : *Kaye v. Fosbrooke*,^(a) *Benfield v. Solomons*.^(b)

Mr. *Teed* and Mr. *Faber*, for the plaintiff, submitted, that, as representing the insolvent debtor, she might sustain a suit in this court in respect of matters in which the assignee, either improperly dealt with the estate, (*Borell v. Dann*),^(c) or colluded with the debtors to the estate : *Lautour v. Holcombe*,^(d) *Barton v. Jayne*.^(e)

The allegation that the assignee had declined to sue for the legacy due to the insolvent was supported by the apparent fact, that fourteen years had elapsed since the insolvency ; and, in *Gedge v. Traill*,^(g) Sir *J. Leach* held, that the consenting to the retention of assets by a stranger was collusion on the part of the person on whom the duty of collecting them devolved. The facts, therefore, amounting to what the court deems to be collusion, are sufficient to sustain the suit, at least until those facts shall be disproved : *Bowser v. Hughes*.^(h) They [*81] *mentioned, also, two unreported cases : *Byne v. Blackburn*,⁽ⁱ⁾ and *Kirlew v. Rayner*.^(k)

(a) 8 Sim. 28.

(b) 9 Ves. 77.

(c) 2 Hare, 440.

(d) 8 Sim. 76.

(e) 7 Sim. 24.

(g) 1 Russ. & Myl. 282, n.

(h) 1 Anstr. 101.

(i) C. P. Byne, suing in his own right, and also as the next friend of the infant plaintiffs, his children, became an insolvent debtor during the progress of the cause, and a supplemental bill was filed bringing Dance, the provisional assignee, before the court : the bill was dismissed as to part of the relief sought, but directions were given in the decree with regard to a trust-fund to which the insolvent's wife (a defendant) was entitled to her separate use, with remainder to her children. T. T. 1831, Reg. Lib., fol. 1922.

(k) Bill by the insolvent and his wife, for an annuity and other benefits bequeathed to the wife before the insolvency and assignment, charging that the whole interest of the legatee was not vested in the provisional assignee, (who was a defendant,) but that the plaintiff, the wife, was entitled to have either the whole or a competent part of the legacies in question settled and secured for her benefit. Decree, M. R., 17 Nov. 1834.

Ormerod v. Haigh, V. C. of England, March 12th, 13th, August 15th, 1839.—A

1843.—Major v. Aukland.

VICE-CHANCELLOR:—The plaintiff in this case is the personal representative of a legatee under the will of W. Major, the testator in the cause. The legatee took the benefit of the Insolvent Debtors' Act, and executed the usual conveyance and assignment to the provisional assignee. The bill is filed to enforce payment of the legacy, not to the plaintiff, but to the provisional assignee. The principal defendants are Aukland, the personal representative of the testator, and Sturgis the provisional assignee. The bill suggests, that the plaintiff has frequently applied to Sturgis, and requested him to institute a suit in equity to establish the right of John Major to the property in question; that Sturgis has refused; and that, under these circumstances, the plaintiff claims the right to institute the present suit for that purpose. The *defendant Aukland, the personal [*82] representative of the testator, objects that the plaintiff has no title to sue. The question is whether the plaintiff having stated that the provisional assignee has refused to sue, may, upon that allegation, herself sustain this suit. The plaintiff insists upon the right to do so, on the ground that the assignee of an insolvent debtor is ultimately a trustee for the insolvent; which, in some sense, is no doubt true. *Prima facie*, however, the assignee is not accountable in this court, but in the Insolvent Debtors' Court; and it is admitted that a special case must be made to support a suit of this nature. If the bill had simply stated the fact of the insolvency, without alleging the refusal of Sturgis to sue, upon being applied to by the plaintiff, it would have been clearly demurrable; and if the refusal be alleged and disproved, the consequence, at the hearing, must be the same. In this case, the plaintiff served the defendant Sturgis with a copy of the bill, on the principle that the bill did not ask for relief against Sturgis, but merely sought to recover money for his benefit. I suggested that Sturgis should appear, not that I entertained any doubt that the effect of the service of the copy of the bill upon him would be to bind him whether he appeared or not,

plaintiff, who was an insolvent debtor, and had made the usual assignment of his property, comprising the matters in question, being joined with other plaintiffs, the bill was dismissed with costs on that ground, without prejudice to the other plaintiffs filing a new bill. Rep. M. S.

1843.—Major v. Auckland.

but because, in the absence of the assignee, the difficulty of sustaining the suit seemed to be insuperable, whilst, upon his appearance and admission of the fact of the refusal to sue, and his disclaimer of any interest in the legacy claimed by the bill, there might have been a question whether, on the authority of the cases of *Leathes v. Newett*(a) and *Williams v. Jones*,(b) which I had occasion to consider in *Mounsey v. Burnham*,(c) a decree might not have been made in favor of the plaintiff in this suit. It is not, however, necessary that I should express

any opinion whether the form of the bill would have precluded that *course from being taken ; for Sturgis has appeared in the suit, and does not disclaim his interest in the subject of it,—nor does he confirm the statement that he has refused to sue, or admit he ever knew of the existence of the claim before the suit was instituted. This, in fact, decides the question. It was plain that I could not make the decree which the plaintiff sought, upon the mere allegation in the bill, in the absence of the provisional assignee ; and the course which the provisional assignee has taken, and no doubt properly taken, on appearing as a party in the suit, has not removed the difficulty. The alleged refusal of Sturgis to sue fails, and the case stands, therefore, as if that refusal was not averred in the bill.

The counsel for the provisional assignee, for the purpose of saving expense, and, if practicable, rendering this proceeding valid, submitted to be bound by any decree which I might make in this suit. The question was, therefore, reduced to this,—whether the provisional assignee, not instituting any suit himself, might put forward the insolvent, or the representative of the insolvent, to sue for property claimed as belonging to the insolvent's estate, the debtor objecting. He may, no doubt, authorize another party to use his name, and accept an indemnity from the person to whom he gives that authority ; but he cannot empower a stranger to sue in his (the stranger's) own name. The provisional assignee has no such power ; and even if he had, it is clear that he had not exercised it at the time the bill was filed : the suit, therefore, not having been originally well instituted,

(a) 3 Ea. & Y. 448.

(b) Younge, 252.

(c) 1 Hare, 21.

1843.—Major v. Auckland.

could not be maintained by the subsequent consent of the provisional assignee to be bound by the proceedings: *King v. Tullock*.(a) I must, therefore, as matter of strict practice,—Auckland persisting in his objection,—dismiss the bill with costs.

NORMAN v. FRAZER.

[*84]

1843; May 31.

Bequest of residuary estate to accumulate for ten years, and then to be distributed in seven equal shares unto seven persons named in the will, and appointment of the same seven persons residuary legatees, creates a tenancy in common; and the share of one dying in the testator's lifetime belongs to the next of kin of the testator.

R. NORMAN, by his will, dated in 1826, directed that the residue of his property, real and personal, whether in possession or reversion, remainder or expectancy, after paying all his just debts, the expenses of proving his will, and his funeral expenses, and all other costs and charges, should be invested in government securities in the names of his executors, and suffered to accumulate for the period of ten years from the time of his decease, at the expiration of which time, the fund so accumulated should be distributed in seven equal shares unto Elizabeth Forty, his niece, R. Forty, William Forty, and E. Forty, children of the said Elizabeth Forty, R. Frazer, and J. Halfacre, and C. Bovier, nephew to his late wife, or to their respective heirs, executors, or administrators; and he appointed the said Elizabeth Forty, R. Forty, William Forty, E. Forty, R. Frazer, J. Halfacre, and C. Bovier, his residuary legatees, and Frazer and Halfacre his executors. The testator died in November, 1826. William Forty died in the lifetime of the testator. The period of accumulation expired in 1836. The next of kin of the testator claimed one-seventh share of the residue and accumulations as having lapsed by the death of W. Forty.

(a) 2 Sim. 469.

1843.—Norman v. Frazer.

Sir *Charles Wetherell* and Mr. *Stone*, for the plaintiff, and Mr. *Kenyon Parker*, for parties in the same interest, said, that the legatees were tenants in common of the residue and the accumulations, and the gift could not be construed as a gift to a [*85] class: *Barber v. Barber*, (a) **Mathews v. Bowman*, (b) *Pitt v. Benyon*, (c) *Ettricke v. Ettricke*. (d) The one-seventh share, therefore, had lapsed, and the next of kin were entitled to it.

Mr. *Cooper*, Mr. *Rogers*, and Mr. *Bichner*, contra, argued that the effect of the latter gift, by naming the parties to be residuary legatees, created a joint-tenancy; and that the seventh share of the deceased legatee devolved to the survivors.

The VICE-CHANCELLOR held that the direction to distribute the residue made the legatees tenants in common; that there was nothing in the subsequent words to control or vary the nature of the first gift; and that, by the death of William Forty in the lifetime of the testator, the next of kin had become entitled to the one-seventh share.

DECLARE that, (certain pecuniary and specific legacies given in the preceding part of the will,) by reason of the death of the said W. Forty in the lifetime of the testator, became respectively lapsed legacies, and fell into the residue of the said testator's estate; and that one equal seventh part or share of, and in the residue and accumulations of, the personal estate of the said testator, by reason of the death of the said W. Forty, one of the residuary legatees of the said testator, in his lifetime, became payable and devisable to and among the next of kin of the said testator according to the Statute of Distribution.

(a) 3 Myl. & Cr. 696—per Lord Cottenham.

(b) 3 Anstr. 727.

(c) 1 Bro. C. C. 589.

(d) Ambl. 656.

1843.—Salisbury v. Petty.

[*86]

SALISBURY v. PETTY.

1843 : July 3, 13.

Devise of real estate to A. for life, subject to the payment of 2000*l.* a-piece to B., C., and D., or to their respective lawful issue, twelve months after the death of the testator, and devise of the same estate, in remainder, on the death of A. to his children as he should appoint, charged with a further sum of 3000*l.* a-piece to B., C., and D., or to their respective lawful issue. B., C., and D., survived the testator. B. died, without issue, in the lifetime of A., and C. and D. died in the lifetime of A., leaving issue :—*Held*, that the legacies to B., C., and D., vested in the legatees, subject to be divested in favor of their children, in case of their death, leaving children ; and, therefore, that B. took both the legacies absolutely, and C. and D. took the legacies of 2000*l.*, each, absolutely, and the children of C. and D. took the legacies of 3000*l.* by substitution for their parents.

THE will of John Park, dated in 1819, after containing a specific devise of certain property charged with the payment of his debts and funeral and testamentary expenses, proceeded as follows :—“ I also give and devise to my said brother, James, all my (describing various hereditaments in the county of Lancaster,) and all other my real estate whatsoever and wheresoever, To hold to him my said brother James and his assigns, during the term of his natural life, without impeachment of or for any maner of waste, subject nevertheless to the payment of £2000, to each of my nephews and niece, John, Thomas, and Mary Park, children of my late brother Thomas, to be paid at the end of twelve months next after my decease, or to their respective lawful issue, and subject also to the payment of the annuity or yearly sum of 100*l.*, hereinafter given to my housekeeper Milicent Redmayne ; and also to so much of my debts, funeral and testamentary expenses, as the houses, lands, and hereditaments, hereinbefore made specifically subject thereto shall fall short to pay ; and, on the death of my said brother James, I give and devise the messuages, lands, and hereditaments, so given to him for life, unto the lawful issue of him my said brother James, in such shares and proportions, manner and form, as he shall by deed or will appoint, subject as aforesaid ; and I do hereby charge the same on his death with the payment of the further sum of 3000*l.* to each

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of my said nephews and niece, John, Thomas, and Mary Park, making in the whole 5000*l.* each, or to their respective lawful issue ; and in default of such appointment, then to the lawful issue *of my said brother James, equally, share and share alike as tenants in common, and not as joint-tenants, subject to the said annuity and the said three legacies of 3000*l.* each ; and in case of the death of my said brother without lawful issue, then I give and devise all the messuages, lands, tithes, and hereditaments, so given to him for life, unto my said nephew, John, his heirs and assigns for ever, he thereout paying the said annuity, and also to his said brother and sister the sum of 5000*l.* each, instead of 3000*l.* ; and in case of the death of my said nephew John, without issue, I give the same in like manner to my nephew Thomas, and his issue, charged with the sum of 6000*l.* to his sister Mary or her issue ; and in case of the death of my said nephew Thomas, without lawful issue, then I give the said messuages, lands, tithes, and hereditaments to my niece Mary, her heirs and assigns for ever.” •The testator then bequeathed the said annuity and various other legacies, and appointed his brother James his executor.

The testator died soon after the date of his will, leaving his brother James, his nephews John and Thomas, and his niece Mary surviving. John, the nephew, died in 1834, intestate, and without having been married. The interest of Mary in the legacies of 2000*l.* and 3000*l.* was, upon her marriage with E. D. Salisbury, settled to the separate use of herself for life, with remainder to her husband for life, or until his bankruptcy or insolvency, with remainder to the children of the marriage. Mary died in 1839, leaving her husband and six children surviving. Thomas, by his will, gave his personal estate to trustees for his children, and died in 1839, leaving four children.

James, the brother and devisee for life, appointed and [*88] devised his real and personal estate to his children *beneficially, and to the defendant Petty and others, as trustees and executors, and died in 1841, leaving several children.

The bill was brought by the children of Mary Salisbury, and prayed that the trusts of the will of John Park, the testator, might be carried into execution under the decree of the court.

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Mr. *Bacon* and Mr. *Rolt*, for the plaintiffs, argued that the legacies of 2000*l.* a-piece to John, Thomas, and Mary, vested absolutely upon the death of the testator, and that the children of such of them as died in the lifetime of the tenant for life would take the second legacies of 3000*l.* by substitution for the parent. *Montague v. Nucella* ;(a) *Galland v. Leonard* ;(b) *Smither v. Willock* ;(c) *Whittell v. Dudin* ;(d) *Turner v. Moor* ;(e) *Gray v. Garman* ;(f) *Lowther v. Condon*.(g)

Mr. *Kenyon Parker* and Mr. *Malins*, for the children of Thomas, the nephew, in support of the like argument, cited *Girdlestone v. Doe* ;(h) *King v. Withers* ;(i) *Gittings v. M'Dermott* ;(k) *Cotton v. Cotton* ;(l) *Davenport v. Hanbury* ;(m) *Swaine v. Burton* ;(n) *Campbell v. Campbell* ;(o) *Home v. Pillans* ;(p) *Sturges v. Pearson* ;(q) *Harrison v. Foreman* ;(r) *Belk v. Slack* ;(s) *Mayer v. Townsend*.(t)[1]

*Mr. *Lowndes* and Mr. *Hurd*, for the personal representatives of John, the nephew, in support of a similar construction, cited also *Bayley v. Bishop* ;(u) and contended that both of the legacies to John vested and belonged to his personal representatives, notwithstanding his death before the death of James, the brother.

Mr. *Walker*, for the children of James, the brother, the devisee for life, submitted that the alternative contemplated by the will, on which the legacies were given to the children of the legatees, was that of the death of the legatees in the lifetime of the testator ; and also that the second legacy to John sunk for the benefit of the estate upon which it had been charged. A

(a) 1 Russ. 165.

(d) 2 J. & W. 279.

(g) 2 Atk. 127.

(k) 2 Myl. & K. 69.

(n) 15 Ves. 368.

(q) 4 Madd. 411.

(t) 3 Beav. 443.

(b) 1 Swans, 161.

(e) 6 Ves. 556.

(h) 2 Sim. 225.

(l) 2 Beav. 67.

(o) 4 Bro. C. C. 15.

(r) 5 Ves. 207.

(u) 9 Ves. 6.

(c) 9 Ves. 233.

(f) 2 Hare, 274.

(i) Pre. Cha. 348.

(m) 3 Ves. 257.

(p) 2 Myl. & K. 15.

(s) 1 Keen, 239.

[1] See note to the case of *Gray v. Garman*, 2 Hare, page 274.

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gift to A. or B. was uncertain ; and the court must add a direction that the legacy is to go to the parent, if living, or to the issue, if the parent is not living : *Longmore v. Broom*.^(a) The court would not make any addition to the words unless it were absolutely necessary, and in this case the word "or" was satisfied by a simple substitution of issue, if there had been issue, without carrying it further. Such a construction must be put on the bequest as would be applicable to the cases of all the legatees in every possible event. He cited also *Crooke v. De Vandes*,^(b) *Corbyn v. French*,^(c) *Tidwell v. Ariel*,^(d) *Bone v. Cook*,^(e) *Cripps v. Wolcott*,^(f) *Pope v. Whitcombe*,^(g) *Newton v. Ayscough*.^(h)

Mr. *Roundell Palmer* for the executors and trustees of James, the brother.

[*90] *VICE-CHANCELLOR :—The questions which have been raised for the opinion of the court are two : first, whether John, who died without issue in the lifetime of the tenant for life, was entitled to the legacies given to him ; and, secondly, with regard to the issue of Thomas Park and Mary Salisbury, whether the words meant in case of their death in the lifetime of the tenant for life, or whether they meant in case of their death in the lifetime of the testator.

With regard to the first question, whether John, having died without issue, took an absolute interest in the gift to him, the scheme of the will is clear : the corpus of the estate was to go to James and his issue, if James died leaving issue living at his death. That is the plain construction of the words. If James died without leaving issue living at his death, then it was to go to John. I think it is also clear, that, by the succeeding limitations, if John died without issue living at his death, the corpus was to go to Thomas, and, if Thomas died without such issue, to Mary. The corpus of the estate was to go, in certain events, to

(a) 7 Ves. 128.

(b) 9 Ves. 197 ; 11 Ves. 330, S. C.

(c) 4 Ves. 418.

(d) 3 Madd. 403.

(e) M'Clel. 168.

(f) 4 Madd. 11.

(g) 3 Russ. 124.

(h) 19 Ves. 537.

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John, Thomas, and Mary, in succession. As to the charges upon the estate, whilst in the hands of James, the tenant for life, there was to be a sum of 2000*l.* to each of his nephews, and to his niece; whilst, in the hands of the issue of James, it is charged with 3000*l.* more to each of them; but in the hands of John, this 3000*l.* was increased to 5000*l.* each, in favor of Thomas and Mary; and, in the hands of Thomas, to 6000*l.* in favor of Mary. These charges upon the estate go on increasing as it comes to these different parties, and it is solely for the convenience of the estate that the payment of the charges is postponed. The rule of the court is, to *hold that such [*91] a gift confers a vested interest in the party taking. In the absence of authority, I should have thought, that, if the gift had been to John, and nothing had been said as to the issue of John, John would have taken an absolute interest. Assuming that to be correct, the circumstance of the gift being in the alternative, to the issue, does not seem to alter the case. I cannot assume that it was not intended that the estate should bear the charge, either in favor of John or John's issue. I think the true construction is, to treat it as a vested interest in him, subject to be divested in favor of his issue, if there were issue alive at his death. Although I do not go the whole length of the argument, that, where property is divested in favor of a particular person only, and that person is not capable of taking the legacies on the event happening, then the legacy to him does not take effect, I think it is quite enough to say, that it is applicable to this case. Some very important authorities were cited in support of that view of the case. The cases of *Smither v. Willock*,^(a) *Whittell v. Dudin*,^(b) and *Mayer v. Townshend*,^(c) were the most important, though not the only cases. To these may be added the case of *Hervey v. M'Laughlin*,^(d) which was not cited. There was in that case a gift of 800*l.* Old and 800*l.* New South Sea Annuities, upon trust to pay the interest, dividends, and produce thereof, to Eleanor Todd, for her natural life, to her separate use; and from and immediately after her death, the said two

(a) 9 Ves. 233.

(c) 3 Beav. 443

(b) 2 J. & W. 279.

(d) 1 Price, 264.

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sums to the three children of Eleanor Todd, "to be divided among them in equal shares ; and in case of the death of either of them, the share of such as may die to go to, and belong to, the children or child, if but one, of the persons so dying."

[*92] There was also a general residuary bequest to the children of Eleanor Todd. Of the three children, one died leaving children ; the other two died without issue living at their death ; and the question arose, like that which arises here, whether, the gift being to them and, in case of their death, to their children, and there having been no children, the legatee should take an absolute interest. The Barons of the Exchequer gave their opinions seriatim. The question that was most considered was, whether the words "in case of death" meant death in the lifetime of the testator, or in the lifetime of the tenant for life. The learned Barons appear to have treated it as not admitting of argument, that those parties who had no children would take their shares absolutely, and that their respective representatives would be entitled to it. They considered it to be a vested interest, subject to be divested only in case there were children to take ; and they held in that case, that the executors of those who died in the lifetime of the tenant for life were entitled to take his or her share absolutely, and that the words "in case of death" were not to be referred to the death of the testator. That case coincides with the others, and in fact it more closely applies to the present point. It accords with the conclusion to which I should have come. In the absence of express authority, I shall follow that case, as well as the others, the most important of which I have mentioned ; and some of those which I have not named would be sufficient to show, that I should be warranted in coming to that conclusion, even if I were not bound to do so. I therefore hold that John took an interest transmissible to his representatives.

The decision in *Hervey v. M'Laughlin* decides the other point also. The construction I adopt is, that John takes absolutely ; but if he dies in the lifetime of the tenant for life, [*93] leaving issue at his death, then the issue of John will take : if John died without leaving issue at his death,

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then, as I decided in *Gray v. Garman*,^(a) it is an absolute gift : it was liable to be divested on an event which might have happened, but did not happen, and therefore it remained absolutely. The cases collected by Mr. Jarman^(b) clearly show, that, if a legacy be given payable at the death of the testator, and, in case of the death of the legatee, to another party, there the court will construe the gift over, in the event of death, to mean in case of death in the lifetime of the testator ; and on the other hand, if the legacy is not payable immediately, but a life-interest is given, and the testator says, in case of the death of the legatee, it is to be given to some one else, then the words “in case of death” are construed to mean in the lifetime of the tenant for life ; that is to say, before the money became payable. This is supported by the case of *Hervey v. M'Laughlin*. The only distinctions are, that I interpose the words “in case of death,” for that must be the meaning of the word “or ;” and in this case the first legacy is directed to be paid at the end of twelve months next after the decease of the testator. The construction of the words, when applied to different events, being, therefore, settled, I have only to construe them according to the several events to which they are to be applied. The sound construction then appears to be, that, as to the gift of the first legacy of 2000*l.*, the issue are to take in case of the death of the legatees, John, Thomas, and Mary, in the life of the testator ; and in the other cases, it is in the event of the death of the parties during the life of the tenant for life, that the children are to take. The children who survived the tenant for life take as joint-tenants, in substitution for their parents who died in his lifetime.

***DECREE.**—This Court doth declare, that John Park, James Park, and Mary [*94] Salisbury, formerly Mary Park, now deceased, the nephews and niece of John Park, the testator in the pleadings, &c. became each of them absolutely entitled, at the death of the said testator, to the legacy of £2000 mentioned in the will of the said testator, and to be raised out of the estates of the said testator, devised to James Park, deceased ; and, it appearing by the Master's general report, dated the 9th day of May,

(a) 2 Hare, 268. [See note to this case at page 274 and the cases and authorities there cited.]

(b) Tr. on Wills, Vol. 1, pp. 452, 454 ; Vol. 2, p. 659, et seq.

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1843, that the said John Park, the nephew, survived the said testator John Park, and deceased in the lifetime of the said James Park, without having issue, this court doth declare, that the defendant Edward Dodson Salisbury, as the personal representative of the said John Park, the nephew, became entitled to receive, at the death of the said James Park, the legacy of £3000, by the said testator's will charged on the estate devised to the said James Park in favor of the said John Park, the nephew, or his lawful issue, and that the said Edward Dodson Salisbury, as such representative as aforesaid, is now entitled to receive the legacy of £2000 bequeathed by the said testator's will to the said John Park ; and, it appearing by the said report that Thomas Park, the nephew, and Mary Salisbury, the niece, died in the lifetime of the said James Park, leaving issue, this court doth declare, that such issue respectively became entitled as joint-tenants, at the death of the said James Park, to the respective legacies of £3000, by the said testator's will charged on the said estates in favor of the said Thomas Park and Mary Park, afterwards Mary Salisbury, and their lawful issue. Account of legacies, interest, and costs. Master to be at liberty to receive proposals for a mortgage, in order to raise the legacies, annuity, and costs ; but if it shall not appear to his satisfaction that the real estates are more than sufficient to raise the said sums, or if no sufficient mortgage be laid before him within a time to be limited by him, then to proceed to a sale of the said real estates, &c. Money to be paid into Court. Decree to be binding on the infant devisees, unless, upon being served, &c., they shew cause within six months after they respectively, attain &c. ; and if they shall not shew cause, to convey, or join in conveying the estates &c. to the mortgagee or purchaser, until the sums be raised, the interest to be kept down out of the rents ; and in the meantime, the purchaser or mortgagee to hold the premises, sold or mortgaged, against the defendants, the infants, until they shall attain &c. Further directions and subsequent costs reserved.

[*95] *IN THE MATTER OF THE ACT 6 & 7 WILL. 4,(a) EX PARTE THE CORPORATION OF TRINITY HOUSE.

1843 : July 1.

Under the act enabling the corporation of Trinity House to purchase property, and in certain cases to pay the purchase money into court, to be laid out in stock for the benefit of the parties entitled, providing that the "costs of the investment of the purchase-money" shall be paid by the corporation, the broker's commission on the purchase of stock is part of the costs of investment to be borne by the corporation.

UNDER the above act, the Corporation of Trinity House caused the value of the Island or Rock of Sherries, and the

(a) An act for vesting lighthouses, lights and sea-marks on the coasts of England, in the Corporation of Trinity House of Deptford Stroud, and for making provision respecting lighthouses, lights, bouys, beacons, and sea-marks, and the tolls and duties payable in respect thereof.

1843.—*Ex parte the Corporation of Trinity House.*

lighthouse, lands, buildings, fixtures, apparatus, and furniture, and the tolls or duties, profits and produce arising in respect thereof, to be assessed by a jury, and the same were accordingly assessed at 444,984*l.* 11*s.* 2*d.*, at which sum the premises were purchased by the corporation. The petitioners were entitled to a life-interest in two-thirds of this purchase money, amounting, after some deductions, to 255,656*l.* 7*s.* 6*d.* The act provided, "that where by reason of any disability or incapacity of the person entitled to any such lighthouse, the purchase-money should be required to be paid into the Bank of England, and to be subject to the order and directions of the court of Exchequer, under the provisions therein contained, the said Court might order all the reasonable costs and expenses attending such purchase, or which might be incurred in consequence thereof, and also of the investment of the purchase-money in real or government securities, and likewise the re-investment of such money, or the government or real securities purchased therewith, in the purchase of houses, buildings, lands, tenements, and hereditaments, as thereinbefore mentioned, together with the *costs, [*96] charges, and expenses of obtaining the proper orders, and of the other proceedings for such purposes, and of the payment of the dividends and interest of the said government or real securities, and of the payment of the principal of the said purchase-money, and of the government or real securities purchased therewith, out of court, to be paid by the corporation."

The 255,656*l.* 7*s.* 6*d.* was paid into court, and the Accountant-General was ordered to invest it in Consols; and it was referred to the Master to tax the petitioners their costs of the order, and of the investment, which costs the corporation were ordered to pay. The Accountant-General invested the 255,656*l.* 7*s.* 6*d.*, after deducting 362*l.* for the broker's commission, in 289,618*l.* 5*s.* Consols. The petitioners added the 362*l.*, paid for commission, to their bill of costs, but the Master disallowed that sum on taxation. The petitioners prayed that the Master might be ordered to review his taxation, or that they might be at liberty to take exceptions to his certificate, or that the corporation might be ordered to pay the 362*l.* into court.

.1843.—Ex parte the Corporation of Trinity House.

Mr. *Kenyon Parker*, for the petition.

Mr. *Wood*, for the Corporation of the Trinity House.

THE VICE-CHANCELLOR said, that the commission charged on the purchase of the stock was included in the costs of the investment, which the act gave to the petitioners, and that the same must therefore be paid by the corporation.

[*97]

MAC MAHON v. BURCHELL.

1843: 20th and 22nd April.

A share of rent due from the occupying tenant of certain premises to the estate of a testatrix, who was one of several tenants in common of the same premises, allowed to be set-off by her executors in a suit for a legacy bequeathed by the testatrix to the debtor; but not as against a legacy bequeathed by the testatrix to the wife of the debtor.

THE plaintiff, William Mac Mahon, claimed a legacy of 100*l.*, and the plaintiff Henrietta, the wife of William, claimed a legacy of 50*l.* under the will of Ann Mac Mahon, who died in 1839, and they filed their bill for payment. The defendants, the executors of Ann, admitted assets; but insisted upon a right, of the nature of set-off, in respect of a claim which the estate of Ann, who was one of seven children and residuary legatees of Terence Mac Mahon, had against the plaintiff William, who, with his brother, Charles, was an administrator with the will annexed of the said Terence, their father.

Terence Mac Mahon, who died in 1811, devised the whole of his estate amongst his seven children, as tenants in common: a part of that estate consisted of a house in the island of St. Kitts, called "The Lower House," which was occupied by the plaintiff William, his brother Charles, and his sisters Rebecca and Eliza, from time to time, for various periods, from 1815 to 1830, without paying rent. The defendants, by their answer, stated the net rent due from the plaintiff William, for the period of his

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occupation, to be 928*l.* 1*s.* 7*d.*, and claimed, for the estate of Ann, the testatrix, one-seventh thereof, or 132*l.* 11*s.* 8*d.*, with interest from 1830. Letters were in evidence, by which the plaintiff William admitted that he was liable to pay some rent.

Mr. *Purvis* and Mr. *Bagshawe*, for the plaintiffs, submitted they were entitled to the decree for the legacies, upon the admission of assets. The claim set up by the *defendants [*98] was made against the plaintiff as administrator : he might be made accountable in that character by another proceeding. The two claims had no connexion with each other : *Dodd v. Lydall*.(a) The liability of the plaintiff could not be properly determined in this suit. There could not certainly be any set-off as against the legacy to the plaintiff Henrietta for her husband's debt : *Carr v. Taylor*,(b) *Ranking v. Barnard*,(c) *Cherry v. Boulton*,(d) *Corsbie v. Free*.(e)

Mr. *Simpkinson* and Mr. *W. Hislop Clarke*, for the defendants.

VICE-CHANCELLOR :—It appears that the plaintiff William Mac Mahon has been occupying tenant of premises which formed part of the estate of Terence, the father ; and that there is rent due from him, to one-seventh of which the estate of Ann, the testatrix, is entitled : the plaintiff has therefore, in his hands, monies which belong to the estate of the testatrix ; and I think the court ought not to disregard that fact, and decree the full payment of his legacy by the executors of Ann.[1] It is not

(a) 1 Haro, 338. See, also, on equitable set-off, *Whyte v. O'Brien*, 1 S. & S. 551 ; *Pettat v. Ellis*, 9 Ves. 563.

(b) 10 Ves. 574.

(c) 5 Madd. 32.

(d) 4 Myl. & Cr. 442.

(e) Cr. & Ph. 64.

[1] That chancery will not set-off unconnected demands, unless there exist extraneous circumstances which render it equitable to do so. *Turpin v. Turpin*, 7 J. J. Marsh. 33 ; *Jenning v. Webster*, 8 Paige Ch. Rep. 503 ; *Green v. Darling*, 5 Mason Rep. 201 ; *Chance v. Isaacs*, 5 Paige Ch. Rep. 592 ; *Holden v. Gilbert*, 7 Paige Ch. Rep. 208 ; *Wathan's exr's v. Chamberlain*, 8 Dana Rep. 164 ; see also *Starkey v. Peters*, 18 Conn. Rep. 181. That a Court of Chancery where there are extraneous

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suggested that there was any joint lease of the premises to the four tenants in common, who at different times occupied the house: they appear to be, at law, severally liable in respect of their occupation. I cannot, however, direct an account of what is due from the plaintiff, unless the whole of the residuary legatees are parties, and are bound by the account and inquiries. If the residuary legatees of Terence, who are not before the [*99] court, will appear and *consent to be bound by the account, I may direct it to be taken in this suit. If anything be found due from the plaintiff William Mac Mahon as the tenant of the premises in question, that will be set-off as against his legacy; but it will not form any set-off against the legacy to the plaintiff Henrietta, his wife.

THE plaintiffs consented to waive the undertaking on behalf of Charles, who was abroad, and an account was directed of the two legacies and interest. And all the residuary legatees of Terence appearing by their counsel, and consenting to be bound by the inquiries and accounts thereby directed, and the plaintiffs and defendants not opposing their appearance, but, so far as they were able, consenting thereto, it was referred to the Master to ascertain whether the plaintiff William Mac Mahon was during any and (if any) what time in the occupation of "The Lower House" in &c. since the death of the said Terence Mac Mahon, and, if so, whether the plaintiff William Mac Mahon ought to be charged with any and (if any) what sum of money, in respect of such occupation; and the Master was to state whether anything and what was paid, and when, since the death of the said Terence Mac Mahon, by the plaintiff William Mac Mahon, for or in respect of repairs and outgoings of the said house, or otherwise on account thereof; and whether, at the death of the testatrix, Ann Mac Mahon, the plaintiff William Mac Mahon had any and what assets of the said Ann Mac Mahon in his hands applicable to pay the said legacies, with liberty to state special circumstances.

circumstances, which render an equitable set-off just, will make a decree to enforce such equitable set-off, see *Gay et al. v. Gay*, 10 Paige Ch. Rep. 369; *Chamberlin v. Stewart*, 6 Dana, 32; *Merrill v. Souther and Fowler*, 6 Dana 305; *French v. Garner*, 7 Porter's Rep. 549; *Pond v. Smith*, 4 Conn. Rep. 302; *Lindsay v. Jackson*, 2 Paige Ch. Rep. 581; *Sarchet v. Admr'r. of Sarchet*, 2 Hammond Rep. 320; *Knapp v. Burnham*, 11 Paige Ch. Rep. 330; *Gould v. Stanton*, 17 Conn. Rep. 377.

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HENDERSON v. HENDERSON.

[*100]

1843 ;—4th, 7th, 11th, and 20th July.

The next of kin of an intestate filed their bill in equity in the Supreme Court of Newfoundland, against A., the brother and deceased partner of the intestate, for an account of the estate of the father of A., and of the intestate, possessed by A., and an account of the partnership transactions, and the dealings of A. with the estate since the death of the intestate. The bill was taken, pro confesso, against A. in the Colonial Court, and, on a reference, the Master reported that certain sums were due to the several next of kin on the account of the estate of the intestate's father possessed by A. ; but that no account between A. and the intestate had been laid before him : the Supreme Court decreed that the sums found by the Master to be due to the next of kin and the costs should be paid to them by A. The next of kin brought their actions in this country against A. upon the decree. A. then filed his bill in this court against the next of kin and personal representative of the intestate, stating that the intestate's estate was indebted to him on the partnership accounts, and on private transactions ; alleging various errors and irregularities in the proceedings in the Supreme Court, and that A. intended to appeal therefrom to the privy council ; and praying that the estate of the intestate might be administered, the partnership accounts taken, the amount of the debt due to A. ascertained and paid, and the next of kin restrained by injunction from proceeding in their actions. Demurrer, for want of equity, allowed on the ground that the whole of the matters were in question between the parties, and might properly have been the subject of adjudication in the suit before the Supreme Court of Newfoundland.

That, inasmuch as the Privy Council is the Court of Appeal from the Colonial Court, and has jurisdiction to stay the execution of the decree pending the appeal, the court will not interfere by injunction, on the ground of error or irregularity in the decree of the Colonial Court.

Whether, in a case of error shown in the judgment of the court of a foreign country, from which there was no appeal to any of Her Majesty's Courts, the decision would be the same—*quære* ?

THE bill was filed in May, 1843, by Bethel Henderson against Elizabeth Henderson, the widow of Jordan Henderson, his deceased brother, and Charles Simms and Joanna, his wife, who was the daughter of Jordan ; and also against J. Gadsden, the administrator of the estate of Jordan, in England ; and it stated that William Henderson, a merchant in Bristol and Newfoundland, the father of the plaintiff and Jordan Henderson, in 1808, admitted them into partnership with him, and in 1817 resigned all his interest in the trade to them : that the plaintiff and Jordan carried on the business in partnership from 1817 : that the

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share or interest in the partnership, which their father gave up to them, was worth 15,000*l.*, or thereabouts, and was continued in, and formed part of, the partnership of the plaintiff and Jordan :

that Jordan Henderson died in March, 1830, intestate, [*101] *leaving the defendants, Elizabeth, his widow, Joanna, (the wife of the defendant C. Simms,) his daughter, and also leaving William, a son: that Elizabeth, the widow, obtained letters of administration of the estate of Jordan, in Newfoundland, and, together with the plaintiff, carried on the partnership business for the purpose of winding it up; but before that was done, a fire in the island, in August, 1832, destroyed the buildings and plant of the partnership, and all the books, except the ledgers; and that disputes then arose between the plaintiff and Elizabeth, the widow.

The bill then set forth a petition presented in November, 1832, by the defendants, the widow and children of Jordan, to the judges of the Supreme Court in Newfoundland, which alleged that William, the father, before his death, gave or bequeathed 1000*l.* to or for the petitioner, Joanna, and gave or bequeathed the rest of his estate between Bethel, the plaintiff, and Jordan, his sons, equally: that Bethel was living with William, the father, at Bristol, and possessed himself of his estate: that Jordan died possessed of considerable real and personal estate in the partnership, both in England and Newfoundland: that Bethel had possessed himself of all such estate, as well as of the partnership books, and carried on trade therewith, and had drawn moneys thereout: that he also refused to satisfy the petitioners whether Jordan had left any will; and prayed that Bethel might be decreed by the Supreme Court to come to an account in respect of all and singular the premises; and that as well the estate of William, the father, as the estate of Jordan, might be applied in a course of administration.

The bill stated that no personal representative of William, the father, or of Jordan, was a party to the said proceeding [*102] in the Supreme Court: that Elizabeth, *the widow, presented another petition, dated the 8th of December, 1832, not intituled in any cause, to the said judges, which alleged, that, since administration of the estate of her husband had been

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granted to her, Bethel, the plaintiff, had rendered her certain accounts of debts and assets in Newfoundland, but refused to account to her for the property of the deceased in England: that he was then about to leave the country, whereby the petitioner would, in all probability, be prevented from bringing him to any account respecting the said estate, unless the Supreme Court should grant immediate process against him: that a brig, called "The Elizabeth," belonging to the intestate and Bethel equally, had, without the petitioner's authority, been laden, at Harbor Grace, by Bethel, principally on freight, under an engagement to sail, on the 10th of December, for Bristol: that the petitioner had good reason to know that the moneys of Jordan, in the possession of Bethel in England, amounted from 5000*l.* to 8000*l.*: the petitioner therefore prayed the writ of *ne exeat regno*, to restrain Bethel from departing out of the jurisdiction, and that he might be ordered to exhibit to the court a full account of all the estate of Jordan come to his hands: that C. Simms, by affidavit, intituled "*Elizabeth Henderson v. Bethel Henderson*," deposed that Bethel was then justly indebted to Elizabeth, the widow, administratrix of the estate of Jordan, in the sum of 3100*l.* sterling, exclusive of such further sum as he might be indebted to her on account of moneys and property in England; and that he threatened to leave the island, and go beyond sea, out of the jurisdiction of the court, whereby the said debt would be lost or endangered, or the recovery thereof would be difficult.

The bill stated that an instrument, purporting to be a writ of *ne exeat regno*, dated the 10th of December,*1832, [*103] was issued out of the Supreme Court, with a summons or subpoena, in the first-mentioned suit: that the plaintiff, on the 22nd of December, executed his bond, with two sureties, to the high sheriff of the island, in the sum of 6200*l.*, conditioned to be void if the plaintiff should personally appear before the court by the 10th of June then next, and render a full account of the estate of Jordan come to his hands, whether arising from the estate of William, the father, or otherwise; and also an account of the said partnership business, and answer and fulfil the orders and decrees of the Supreme Court touching the said estate, and also touching a certain bill, then filed, of Elizabeth Henderson and

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others, against the plaintiff: that the plaintiff then quitted the island, and returned in 1834: that, on the 14th of June, 1834, the Supreme Court ordered the bond to be put in suit, unless the plaintiff should put in his answer to the first petition; and, in July, 1834, the plaintiff appeared in that suit by H. A. Emerson, Esq., her majesty's solicitor-general in the island, who also prepared the plaintiff's answer, which was sworn and filed on the 11th of July, 1834, intituled in the first suit only.

The bill then stated the purport of the plaintiff's answer: that exceptions were taken by the petitioners, for that he had not set out an account of the partnership transactions, or of the estate of Jordan, possessed by him; or whether William, the father, left any and what estate, for the use of Jordan or his family: that the Supreme Court ordered, that the accounts prayed for in the first suit should be filed before the 25th of July, or that the bond should be assigned to the petitioners, to be put in suit: that the plaintiff had, for several years, employed J. Fitzgerald, an accountant in the island, in keeping the accounts of the said business; and, in order that Fitzgerald might [*104] make out the accounts of the partnership, the plaintiff, on the 20th of July, delivered over to him the books and accounts of the business in England, and on the same day the plaintiff quitted the island.

The bill then stated that Fitzgerald made out, in distinct parts, the accounts of the partnership, from 1817 to the death of Jordan, and the subsequent accounts of the plaintiff, and filed the same on the 4th of August, 1834, and verified them, by affidavit, as true extracts from the plaintiff's books: the bill stated the balances appearing by the several accounts; the result of which was, that 4500*l.* and 883*l.* 7*s.* 5*d.* were owing to the plaintiff from the Newfoundland concern, and that a further sum of 2366*l.* 15*s.* 4*d.* was owing to him from the estate of Jordan, in respect of transactions since his death; and a large sum was also owing to the plaintiff, as a private debt, in respect of advances he had made for the use of Jordan and his family.

The bill then set forth a letter received by the plaintiff from his solicitor and counsel, H. A. Emerson, Esq., stating that delay had occurred in the report on the exceptions, owing to the

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answer having been mislaid by the clerk of the court, and adverting to what had been since done: that the plaintiff received no further information respecting the suit, except that he had recently learnt that the master, on the 26th of December, 1835, reported the plaintiff's answer to be sufficient, but that the accounts had been subsequently filed; and, upon the motion of the plaintiff's counsel, the accounts were referred to the master for his report: that the petitioners excepted to the master's report, and in January, 1835, obtained an order discharging the order by which the accounts were referred to the master: that no further proceedings were ever taken on the said petition: *that, in 1836, the plaintiff discharged H. A. [*105] Emerson, Esq., as his solicitor, and did not employ any other solicitor, and thenceforwards had no counsel or solicitor in the island, as all the defendants and their solicitor well knew.

The bill then stated that in January, 1837, the defendants obtained a rule for leave to amend the first mentioned petition or bill, no person being authorized by the plaintiff, who was out of the jurisdiction, to oppose the same: that in May, 1837, the defendants exhibited a bill in their own names, (and in that of William, the son, without his authority,) addressed to the Judges of the Supreme Court. [The bill was then set forth: it charged the plaintiff with having possessed the sum of 30,000*l.* in respect of the estate of William, the father,—impeached the partnership and other accounts put in by the plaintiff in various specific points,—and charged him with misappropriation and loss of the partnership property and estate since the death of Jordan, and calling for discovery on various subjects: and it prayed that the plaintiff might account and pay to the defendants their share of the alleged assets of William, the father, the partnership property which belonged to Jordan,—the amount of the losses thereto by the carrying on of the trade since his death, and that they might be at liberty to inspect the original books of account of the Bristol trade.]

The bill stated that the summons or subpoena, requiring the plaintiff to appear to the bill, was served on H. A. Emerson, Esq., on the pretence, that, as he had been the plaintiff's solicitor and agent in the petitions, he was so in the said third suit:

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that a commission was issued by the Supreme Court to take the plaintiff's answer, and that in October, 1837, one of the [*106] persons named in the *commission communicated with the plaintiff, then residing at Bristol, and required him to put in his answer, and lent the plaintiff a copy of the bill, being the first intimation of the suit which he had received. The bill then stated that the pretended service and other proceedings were wholly irregular, contrary to the rules of the Supreme Court, which were set out, and also to the statute for the better administration of justice in Newfoundland :(a) that the commission was returned with a declaration by the commissioners that the plaintiff had not put in, and did not intend to put in any answer.

The bill then stated that the defendants (the plaintiffs in the third suit) in December, 1839, obtained a rule nisi to take their bill pro confesso against the plaintiff, and served the same on H. A. Emerson, Esq., who, without authority, took upon himself to appear on the motion as the plaintiff's counsel and solicitor, and on the 11th of February, 1840, the Supreme Court ordered the last-mentioned bill to be taken pro confesso, and referred it to the Master to compute principal and interest due to the defendants: that, on the 18th of April, 1840, the Master of the Supreme Court made a rule or order, addressed to H. A. Emerson, Esq., appointing the 23d of April to take the account: that the meeting was adjourned to the 30th April, when the defendants' solicitor put in an account, charging the plaintiff with sums amounting to 17,054*l.* 12*s.* 9*d.* in respect of the partnership transactions, and 15,000*l.* in respect of the estate of William, the father, but allowing no credits whatever to the plaintiff: that the Master made his report, dated the 6th of June, 1840, and thereby, after stating that he had not had any account between [*107] Bethel and Jordan laid before him, he found, that the *defendant Bethel received from William, the father, some time previous to his death, which occurred in the year 1821, the sum of of 30,000*l.* sterling, in trust to pay one moiety thereof to Jordan; and that Jordan died intestate, in 1830, leaving the plaintiff Elizabeth, his widow, and two children only, namely,

(a) 5 Geo. 4, c. 67.

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Joanna (married to C. Simms) and William ; and he found, that, of the said sum of 30,000*l.* sterling, one moiety, or 15,000*l.*, together with interest thereupon, was then due to the widow and children of Jordan by the defendant Bethel, to be paid in the proportions thereafter directed ; and, upon the said sum of 15,000*l.* he computed simple interest, from the 1st of January, 1822, to the 1st of June, 1840, at 4*l.* per cent. per annum, which amounted to 11,650*l.* sterling, making, with the principal, the sum of 26,650*l.*, which he thereby reported to be due and payable to the plaintiffs by the defendant Bethel, in the following proportions, namely, the sum of 8883*l.* 6*s.* 8*d.* to the plaintiff Elizabeth Henderson ; a like sum to the plaintiff C. Simms and Joanna, his wife ; and a like sum to the plaintiff William Henderson.

The bill stated that this report was filed on the 6th of June 1740 : that an order nisi to confirm was served on H. A. Emerson, Esq., and that the same was confirmed absolutely on the 10th of June, 1840 : that the defendants obtained an order for a final decree nisi, but the Judges of the Supreme Court directed, that, as H. A. Emerson, Esq. had withdrawn from the defence of the suit, the notice of motion for the final decree should be served on the plaintiff personally ; and that, if cause should not be shown by the then next term, the final decree should be made : that no notice of such motion was ever served upon the plaintiff ; but that, in March, 1841, the plaintiff was served with a document purporting to be a subpoena to hear judgment ; to which was *attached a notice, signed by the solicitor of the de- [*108] fendants, "that the Master's report, filed on the 6th of June, 1840," stood confirmed : that, on affidavit of the service of the said document, the Supreme Court, on the 6th of June, 1841, made a decree. [The bill set forth the decree, which recited the various proceedings, as having been duly prosecuted ; and ordered and decreed, that Bethel, the defendant therein named, should pay to Elizabeth, the widow, 8883*l.* 6*s.* 8*d.* sterling ; to C. Simms and Joanna, his wife, 8883*l.* 6*s.* 8*d.* and to William, the son, 8883*l.* 6*s.* 8*d.* : and that he should also pay to the plaintiffs their costs of the suit.]

The bill then specified many of the statements recited in the decree, which it alleged were untrue : that the third bill was in

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fact an original, and not an amended bill; and that there were various other irregularities in the proceedings: the bill alleged that, in December, 1841, before the plaintiff had notice of the decree, the same was inrolled: that, in August, 1842, the plaintiff was applied to, by the attorney of the defendants, for payment of the said sum of 8883*l.* 6*s.* 8*d.* to the defendant Elizabeth, the widow, and the like sum to the defendant Simms, and Joanna, his wife, with 55*l.* costs, which was the first notice he received of the final decree; and that the defendants had lately brought two actions against the plaintiff in the Queen's Bench to recover the said sums.

The bill charged that the decree was wholly irregular, and ought not to be enforced, and that the same ought to be reversed by Her Majesty in Council, on the plaintiff's appealing against the said decree, which, notwithstanding the inrolment thereof, he intended to do: that there was no personal representative of Jordan Henderson, appointed in this country, party to any

[*109] of the *proceedings; and that there was no personal representative whatever of William, the father, a party thereto: that none but a personal representative of Jordan Henderson was entitled to, or could give a discharge for, any part of his personal estate.

The bill alleged that the whole of the estate of William, the father, had consisted of the partnership property, given up by him to Jordan Henderson and the plaintiff, his sons, and continued by them in the business, and that the plaintiff was only accountable for the same with, and as part of, the other partnership assets; and, if the partnership accounts were properly taken, it would appear, and was the fact, that a very large sum of money was due and owing to the plaintiff from the estate of Jordan, in respect of advances by the plaintiff to the concern, payments beyond his receipts, and money drawn out by Jordan his widow, and family; and that the estate of Jordan was also indebted to the plaintiff in two sums, of 547*l.* and 538*l.*, in respect of monies which the plaintiff had expended, at Jordan's request, in the education of his said children.

The bill prayed that an account might be taken of what was due to the plaintiff from the estate of Jordan, and of the other

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debts of Jordan, and of his personal estate, and that the same might be applied in a due course of administration : that an account of the partnership transactions between the plaintiff and Jordan might be also taken : that all necessary inquiries might be directed to ascertain the personal estate of William, the father ; that so much, if any, of the said two sums of 8883*l.* 6*s.* 8*d.* as might be found payable by the plaintiff (he not admitting that any part thereof was so payable) might be applied and administered as part of the assets of Jordan : that the defendants, Elizabeth, the widow, and Simms and *his wife, [*110] might be restrained by injunction from proceeding with the said or any other action to recover the said two sums of 8883*l.* 6*s.* 8*d.* ; and that a commission might be issued to examine witnesses in Newfoundland.

To this bill, the defendants, Elizabeth, the widow, and Simms and his wife, demurred for want of equity, want of parties, and multifariousness.

Mr. *Tinney*, Mr. *Burge*, and Mr. *Rolt*, for the demurrer.

Mr. *Purvis* and Mr. *Bagshawe*, for the bill.

The points submitted to the court in argument will sufficiently appear from the judgment. The authorities cited were, *Phillips v. Hunter*,(a) *Cottington's Case*,(b) *White v. Hall*,(c) *Henley v. Soper*,(d) *Fuller v. Willis*,(e) *Alivon v. Furnival*,(f) *Cowan v. Braidwood*,(g) *Becquet v. M'Carthy*,(h) *Houlditch v. Marquis of Donegal*,(i) *Russell v. Smyth*,(k) *Ferguson v. Mahon*,(l) *Thompson v. Derham*,(m) *Burge Com. Col. Law*, Vol. 3, p. 1058.

VICE-CHANCELLOR :—The plaintiff by his bill alleges, that he, and Jordan, his late brother, were partners in business, one branch of which was carried on at Bristol and the other at New-

(a) 2 H. Bl. 402.

(b) 2 Swans. 326, n. ; Lord Nottingham's M. S.

(c) 12 Ves. 321.

(d) 8 B. & C. 16.

(e) 1 Myl. & K. 292, n.

(f) 1 Cr., Meca., & Ros. 277. (g) 1 Man. & Grang. 882. (h) 2 B. & Adol. 951.

(i) 8 Bligh., N. S., 301.

(k) 9 Meca. & W. 810.

(l) 11 Ad. & Ell. 179.

(m) 1 Hare, 358.

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foundland ; and that, in respect of that partnership, he
[*111] is *a creditor to a large amount on the estate of Jordan :
that part of the partnership property was derived from
their father ; and that all the property which they derived from
their father formed part of the assets of the partnership. The
plaintiff also alleges that he is a creditor on the estate of Jordan,
in respect of a private debt ; and the bill prays such an account
as would comprise all these matters which are in question be-
tween the plaintiff and the estate of Jordan. Upon these facts,
a decree for an account against Gadsden, the personal represen-
tative of Jordan in England, would be of course, and perhaps
also, if that had been the object of the suit, the decree for an ac-
count might have been extended to Elizabeth, the widow, as
the personal representative of Jordan in Newfoundland. The
widow of Jordan, and Simms and his wife, are, however, before
the court in the character of next of kin, and there is no pretence
for making them parties in that character in a suit for the mere
administration of the estate of Jordan. The relief sought against
those parties is founded upon the proceedings which have taken
place in the court in Newfoundland, and the use which they are
about to make of these proceedings in this country.

The defendants, who have demurred, insist, in support of
their demurrer, first, that all and every part of the matter in
- question on this bill was concluded by a final decree of the Su-
preme Court of Newfoundland, dated in June, 1841, made in a
suit wherein the defendants and William, the son of Jordan,
were plaintiffs, and the present plaintiff was defendant, except
in so far as that decree is subject to be reviewed in the privy
council ; secondly, that by that decree the amount recovered
was decreed to be paid to the plaintiffs in that suit as beneficial
owners, and that the same thereby ceased to be part of
[*112] the estate of Jordan, subject to his debts. They *insist,
moreover, that the proceedings appear upon the bill with
sufficient certainty to sustain the decree upon the grounds ad-
vanced ; and that the only party against whom the plaintiff can
proceed to recover his claim, or any part of it, is the defendant
Gadsden.

I have read the bill carefully, and without going minutely

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through the facts of the case, it is sufficient to say, for the purpose of explaining the order I am about to make, that the original bill in the Supreme Court of Newfoundland claimed an account of the same partnership dealings, of which accounts are prayed by the present bill; and also sought accounts in respect of the estate of William Henderson, the father, possessed by Bethel on account of Jordan; that the defendant in that suit, who is the plaintiff here, made claims by his answer to the original bill corresponding in substance with those which he makes by his bill in the present suit: that an amended bill, or a bill which the court at least thought it right to term an amended bill, was afterwards filed by the same plaintiffs against Bethel: that the amended bill stated and charged that Bethel was largely indebted to the estate of Jordan, on the partnership accounts; but that such accounts could not be taken in consequence of Bethel absenting himself from the island and not producing the documents: and it further appears that, Bethel having absented himself from the jurisdiction, an order of the Supreme Court was made in February, 1840, for taking the amended bill pro confesso; and that the amended bill was by the same order referred to the master, to compute principal and interest due to the plaintiffs; and that the master made his report in June, 1840. [His honor stated the report.(a)] It appears further, that the Supreme Court pronounced its final *decree in June, [*113] 1841, and thereby, after referring to all the antecedent proceedings in the cause, decreed that Bethel Henderson should pay to the widow and two children of Jordan, who were plaintiffs, the sum of 8883*l.* 6*s.* 8*d.* each, and the costs of the suit.

This decree, explained by the report, has in effect severed William the father's estate from the bulk of the property in question, and the partnership accounts and the private debt are not specifically the subject of adjudication. Upon this decree, Elizabeth the widow, and Joanna the daughter of Jordan, and the husband of Joanna have brought their actions in this country.

The bill charges that the proceedings leading to this decree were irregular, that the decree itself was irregular, that a large

(a) *Supra*, pp. 106, 107.

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balance was due to the plaintiff, and that the decree ought not to be enforced, but ought to be reversed by her Majesty in Council on appeal, which the plaintiff intends to bring. The bill specially alleges, as one ground of irregularity, that the report of the master, of the 6th of June, 1840, wholly omitted any notice of the account connected with the partnership, and is confined to the moneys alleged to be due from the plaintiff, in respect of the estate of William Henderson, the father; and that a large sum of money is due to the plaintiff on the partnership accounts, as would appear if they were properly taken. On behalf of the defendants, it has been argued, that the proceedings on the face of the bill showed that the decree concluded the whole matter, that I could not rehear that decree, and that it was final and conclusive, unless reversed by the privy council, the proper appellate tribunal.

Without giving any opinion upon the question, whether [*114] charges, showing that the proceedings in a foreign court were altogether null and void, as being against natural justice, would or not, upon the general demurrer, have been treated as null, and have sustained the bill as to the whole of the relief prayed, I have no doubt that mere irregularity in the proceedings is insufficient for that purpose, in a case in which an appeal lies from the colonial court to the mother country, and there is a tribunal competent to reform the errors of the court below, and even to suspend the execution of the decree pending the appeal, if justice requires that it should be suspended.(a)

But as the plaintiff in this case argued only that the whole question between the parties was not concluded by the decree, and did not contend, that, upon the charges in the bill, I ought to disregard the decree, I assume, for the present purpose, that I must, upon this demurrer, consider the amount due from Bethel, in respect of William the father's estate, as concluded by the decree of the supreme court, subject only to the appeal to the privy council; and that the only question I have now to decide, is whether I am to consider the partnership account and the claim

(a) See stat. 3 & 4 Will. 4, c. 41, s. 21; and see also the Charter of Justice of Newfoundland, Clark's Summary of Colonial Law, pp. 433, 434.

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of Bethel in respect of the private account as having been likewise the subject of adjudication by the supreme court in the island, or whether those items in the general account, which certainly might have been taken in that suit, are to be considered as excepted out of the operation of the decree, under the special circumstances appearing on the master's report, and the other proceedings stated in the bill.

In trying this question, I believe I state the rule of *the [*115] court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.[1] Those who

[1] A judgment in the United States District Court, which was generally for the defendant, and it was held that it would be supposed to cover the whole case, and not to have rested upon only a branch of it. *Fourniquet v. Perkins*, 7 Howard, 160. Where matter has been twice adjudicated upon by competent tribunals, it is too late for a party to apply to have a re-examination of it, unless fraud be established, or mistake be shown, which he did not know and could not have guarded against at the proper time. *Bruen v. Hone*, 2 Barb. Sup. C. R. 587. A judgment of competent jurisdiction is final, not only as to the matter actually determined, but as to every other matter which the parties might litigate in the cause, and which they might have had decided. *Bruen v. Hone*, 2 Barb. S. C. R. 587; *Bouchaud v. Dias*, 3 Denio R. 238; *Gardner v. Buckbee*, 3 Cowen, 120; *Draper v. Gordon*, 4 Sandf. Ch. R. 210. A judgment obtained without fraud or collusion, is conclusive evidence, in suits between creditors in relation to the property of the debtor, of the indebtedness of the latter, and of the amount of indebtedness. *Candee v. Lord*, 2 Comstock R. 269. It is not necessary that the claim in both suits should be identical in order to have the doctrine of *res adjudicata* applied. If they arise out of the same transaction, and the defence or claim is equally applicable to each suit, the first judgment will be conclu-

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have had occasion to investigate the subject of bills of review in this court will not discover anything new in the proposition I

sive. *Bouchaud v. Dias*, 3 Denio R. 238; *Gardner v. Buckbee*, 3 Cowen, 120. In order to render a judgment conclusive in a new suit in relation to the same matter, it is requisite that the former suit should have been between the parties to the last suit or their privies, but it is not essential that all the parties in the first suit should be parties in the last. *Dowe McMichael*, 6 Paige Ch. R. 139. The decision of a court of competent jurisdiction is conclusive upon the parties, as to the title claimed under it, and as to the facts directly put in issue and determined, so that such title or facts cannot be again contested, between the same parties in the same court, or any other. *Holcomb, adm'r. v. Phelps*, 16 Conn. R. 127; *Calkins v. Allerton*, 3 Barb. S. C. R. 171; *Green v. Clark*, 5 Denio R. 497. A co-ordinate tribunal cannot review the decision of the court made upon an application for the disposal of an infant's equitable estate. *Pitcher v. Carter*, 4 Sandf. Ch. R. 1. But if the order of the court in such a case is obtained by misrepresentations as to the situation of the property, and by concealment of facts very material to the exercise of the judgment of the court, the order cannot be upheld in favor of the parties participating in, or chargeable with notice of such misrepresentation or concealment. *Ib.* I. Where the court has peculiar and exclusive jurisdiction, its decree is binding upon the judgment of any other court in which the same subject comes immediately in controversy. *Holcomb, adm'r v. Phelps*, 16 Conn. R. 127. Where in a case in equity, after demurrer to the bill, which was overruled, and the report of a committee, was reserved by the superior court, for the advice of all the judges, as to what decree should be passed; it was held that the sufficiency of the bill was *res adjudicata*, and no longer open for discussion. *Johnson v. Sandford*, 7 Conner's N. S. R. 461. An adjudication of two justices in favor of a party charged with being the father of a bastard child, is a bar to a second proceeding against him respecting the same matter. *Thayer v. Overseers of Hamilton*, 5 Hill N. Y. R. 443. A decree of a court of chancery dismissing the bill of complaint, where the cause has been set down for hearing after replication, and an order closing the proofs, is a bar to a subsequent suit for the same cause, between the same parties, although no proofs were in fact taken, and such decree was by default at the hearing. *Ogsbury v. La Farge*, 2 Comstock R. 113. A decision on a point of law, in a former case, between the same parties, in the same court, is not an estoppel or conclusive; but it is binding upon the same court, though held by another judge, unless the latter be clearly and strongly convinced of its error. *Carter v. Bloodgood, ex'r.*, 3 Sandf. Ch. R. 293. The decision of the vice-chancellor, dissolving an injunction, is conclusive between the same parties, in that branch of the court, or any application for its revival on the same state of facts; or on a new state of facts except upon leave first had, to apply anew. *Banks v. The American Tract Society*, 4 Sandf. Ch. R. 438. But the decision does not conclude such vice-chancellor, nor any other judge from granting a perpetual injunction on the same state of facts, at the final hearing of the cause on the merits. *Ib.* Where a cause was set down for a hearing, on the bill and answer, and the bill was dismissed with costs, because no person appeared for the plaintiff, and the decree was enrolled, the decree was held to be no bar to another suit for the same matter in substance as that con-

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have stated, so far as it may apply to proceedings in this country: and in an application to a court of equity in this country, for its aid against the effect of proceeding by a court of equity in one of the colonies, I conceive it to be the duty of this court to apply the same reasoning, at least in the absence of charges in the bill, showing that a different principle ought to be applied.^(a) The observations of Lord Cottenham in the case of *The Marquis of Bredalbane v. The Marquis of Chandos*^(b) have an important bearing upon this point. I may mention also the cases of *Farquharson v. Seton*,^(c) *Partridge v. Usborne*,^(d) and the judgment of Lord Eldon in *Chamley v. Lord Dunsany*,^(e) as showing the general principle to which I have adverted.

It is plain that litigation would be interminable *if such [*116] a rule did not prevail. Now, undoubtedly the whole of the case made by this bill might have been adjudicated upon in the suit in Newfoundland, for it was of the very substance of the case there, and *prima facie*, therefore, the whole is settled. The question then is, whether the special circumstances appearing upon the face of this bill are sufficient to take the case out of the operation of the general rule.

Now what are those circumstances? One circumstance relied upon was, that, by the decree of the colonial court of the 11th of February, 1840, the amended bill only was taken *pro confesso*. The amended bill, it appears, is not, as in this court, the original bill amended and written upon, so that the amended bill wholly supersedes and comes in the place of the original bill; but the amendments are upon a distinct record.

The bill in this cause charges that the last bill was in fact

tained in the pleadings in the former action, on the ground that the merits of the former cause were never discussed, and no opinion of the court had been expressed upon them. That where the defendant pleads a former suit, he must show it was *res adjudicata* or absolute determination of the court, that the plaintiff had no title. A bill dropped for want of prosecution, could not be pleaded as a decree of dismissal, in bar of another bill. *Ross, assignee v. Rust*, 4 John. Ch. R. 300; Mitf. Pl. 195; See also *Babcock v. Peck*, 4 Denio R. 292; *Onderdonk v. Ranlett*, 3 Hill N. Y. R. 323; so at law a judgment of non-suit is not a bar to another action.

(a) See *Bentinck v. Willink*, 2 Hare 1.

(b) 2 Myl. & Cr. 732, 733.

(c) 5 Russ. 45.

(d) *Id.* 195.

(e) 2 Sch. & Lef. 718.

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and substance an original bill, and addressed to different judges, and that it was not an amended bill; this charge I might have been bound to take as a fact, if the plaintiff had not, by setting out the amended bill and the final decree, given me an opportunity of judging in what sense only the charge is true. I find that the amended bill proceeds upon and refers to the original bill, and to the answer of the defendant thereto, and the final decree of the court recites the whole of the proceedings anterior to the final decree, beginning with the original bill. It is impossible, therefore, to contend with effect, that the amended bill, though in a sense distinct from the original bill, as being written upon other paper, leaving the first bill still on the record, was not a continuance of the pleadings in one and the same cause, and this, critically considered, is not inconsistent with the charge in bill which I have just read.

[*117] *Another objection was the absence or the irregularity of service upon the plaintiff. Although it is not necessary that I should go into the question respecting the notice, I ought not to disregard the fact that the plaintiff represents that he had, on different occasions, actual notice of the suit, and of the relief which was sought against him by it, however irregularly that notice might have been communicated; and if the plaintiff thought that he might safely disregard the proceedings, and abstain from interposing any defence, on the ground of their irregularity, I think I ought to consider him as having relied on the strength of his case for establishing that irregularity by a complaint in the same jurisdiction, or in the court of appeal, and not to have relied on being therefore able to set the decree of the Supreme Court at defiance, even while it remained unreversed.

I may here recur to the observation, that the omission of the master to take the partnership accounts is stated in the bill to be an error in the decree, forming one ground for appeal to the privy council.

The point upon which I have had most difficulty in satisfying myself is this: if the decree of the Supreme Court is conclusive upon one party, it must, I conceive, be conclusive upon both; and, if not conclusive upon both, it ought to be conclusive upon neither. Now the amended bill alleged that the plaintiffs

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there were creditors upon the partnership account, but that the accounts of the partnership cannot be taken, owing to the manner in which the defendant in that suit had acted. These allegations were established as facts, by the effect of the order for taking the bill *pro confesso*; and it appeared to me during the argument, that the present defendants (the plaintiffs in Newfoundland) might have a *right to say that the ac- [*118] counts not taken by the master were open for their benefit, by reason that it was the conduct of the defendant alone which had prevented those accounts from being taken. But that, I think, is not a correct view of the case. The decree was to compute what was due to the plaintiffs for principal and interest; that is, upon all the accounts in question in the pleadings, including the partnership and private account. The plaintiffs were not compelled to take such a decree, but having taken it, they are bound by the consequences, and must be taken to have waived any disadvantage to themselves which would result from it.

The conclusion to which I must come, in a case where relief is sought in this court in consequence of errors and irregularities in the decree of a colonial court,—and an appeal lies from that decree to the appellate jurisdiction in this kingdom,—is to allow the demurrer. I do not say that my conclusion would have been the same if the proceedings which were impeached had taken place in a foreign court, from which there was no appeal to any superior jurisdiction which a court of equity in this country could regard as certain to administer justice in the case. I express no opinion on that point.

Demurrer allowed, with liberty to amend.

Dec. 18th.—The bill was not amended; and this day, on the motion of the defendants, was ordered to be dismissed.

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[*119]

*HUMBLE v. SHORE.

1842 : December 23.

A suit was instituted to administer and ascertain the residue of an estate, and one of the residuary legatees, after the bill was filed, and before he was served with the subpoena to appear and answer, assigned his share: the assignee was held to be a necessary party to the suit.

In an administration suit, a party interested in the residue, by his answer, averred, that, according to his information and belief, the suit was collusive as between the plaintiffs and the executors and other parties: there being no replication, the allegation was taken as proof of the fact; and it was held, that the fact was no objection to the making of the decree.

THE plaintiffs were entitled, under the will of Lydia Shore, to certain residuary shares in her real and personal estate, and the bill was filed against the executors and trustees, and the other parties interested in the residuary estate of the testatrix, to carry into execution the trusts of the will. The cause coming on for hearing,—

Mr. *Temple* and Mr. *Freeling*, for one of the residuary legatees, objected that he had executed an assignment of his share in the residuary estate after the filing of the bill, but before he had been served with the subpoena, and that the assignee was a necessary party to the suit: *Pigott v. Nower*.(a)[1]

Mr. *Rolt*, for the plaintiffs, submitted that an assignee *pendente lite* would be bound by the proceedings in the cause, and that the absence of the assignee was not therefore any ground for refusing the usual decree: *Landon v. Morris*.(b)

The VICE-CHANCELLOR allowed the objection, and the cause stood over.

1843 : *May 13th*.—The plaintiffs filed their supplemental bill

(a) 3 Swans. 535, n.

(b) 5 Sim. 262.

[1] See *Hallett v. Hallett*, 2 Paige, 15; *Moran v. Hays*, 1 John. Ch. Rep. 339; *Mumford v. Sprague*, 11 Paige, 438.

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against the assignee of the residuary share, seeking the like relief against the defendant as was prayed by the original bill. The defendant admitted the will, but said he was informed and believed that the suit was collusive as between *the plaintiffs and the executors and other parties; and [*120] that he had instituted another suit against the executors, impeaching their conduct with respect to particular matters which did not form the subject of any special charge in this suit. The plaintiffs did not reply to this answer. At the hearing,—

Mr. *Romilly* and Mr. *Rolt* said, that the allegation, that the defendant was “informed and believed” the plaintiffs and defendants colluded, was no averment of the fact; and if it were true, the fact was wholly unimportant. The plaintiffs and the other residuary legatees (except the defendant to the supplemental bill and his assignor) desired that the accounts should be taken, and the trusts executed in this suit: in that sense, a great part of the suits in this court were collusive: any special inquiries which the objecting defendants could suggest might be made in the decree.

Mr. *Daniel*, for the executors, offered to submit to any inquiries with respect to the estate which any of the defendants had, by their answers, suggested to be necessary.

Mr. *Heathfield*, Mr. *Willcock*, and Mr. *Bigg*, for other parties, supported the argument for the plaintiffs.

Mr. *Temple* and Mr. *Freeling* argued that collusion was an objection to the suit; and cited the judgment of Mr. Baron *Clark*,^(a) sitting for Lord *Hardwicke*.

The VICE-CHANCELLOR said, that the allegation in the answer, that the defendant was informed and believed *a certain fact, was a sufficient averment of that fact to [*121] entitle him to the benefit of it in a case where, by not filing a replication, the plaintiffs had deprived the defendant of

(a) 3 Atk. 602.

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any opportunity of tendering evidence to prove the fact; but the collusion alleged, even if proved, would be no objection to the decree in this case. There might, undoubtedly, be cases in which collusion between the plaintiff and some of the defendants would be a material circumstance. Suppose, for example, a plaintiff claimed to be a creditor on an estate, and the executor, or one of the executors or administrators, knowing there was no debt due to the plaintiff, yet, for the purpose of giving the decree, admitted the alleged debt, it was impossible to say that in such a case the court would not regard the collusion as a material fact. In this case, however, there was no particular matter alleged by the answer, which would go beyond a question of account as against the executors. Any inquiries with respect to the liabilities of the executors might be made in this suit,—and even if they related to subjects not mentioned in the bill, if the executors submitted.

The usual accounts and inquiries were directed, with some special inquiries, and a receiver was appointed.

[*122] LORD WALSLINGHAM v. GOODRICKE, Bart.

1843: July 21, 22, 29.

Upon a motion that the defendant might produce documents in the schedule to his answer—*Held*, that written communications which passed between the defendant and his solicitor before any dispute had arisen between the parties to the suit were privileged, so far as they contained legal advice or opinions, but not otherwise,—although relating to the matters which formed the subject of the suit.

There is no essential difference, with respect to the privilege of professional confidence, between cases stated for the opinion of counsel, and other communications.[1]

THE bill prayed specific performance of the agreement thereby stated to have been made by the defendant to sell to the plaintiff

[1] In *Ludlum v. March*, 3 Sandf. Ch. R. 35, it was held, that where there is a dispute, and one of the parties consults an attorney, solicitor, or counsellor, on the subject, the communications between such party and his legal adviser are sacred, and the court will not permit them to be divulged without the client's consent. Thus, in

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an estate in Norfolk. The proposals for the sale were made through Mr. Dowbiggin, an upholsterer, on behalf of the de-

a dispute where there are conflicting rights in existence, or claims made to the same property, which, unless abandoned by one party or the other, or arranged amicably, will terminate in litigation, the privilege is not affected by the circumstance that the client offered no compensation, and the legal adviser did not make or expect to make any charge for his opinion. For cases upon the subject of privileged communications, see *Coveney v. Tannahill*, 1 Hill's N. Y. Rep. 33; *Wheeler v. Hill*, 4 Shepley's Maine Rep. 329; *Hewitt v. Prime*, 21 Wend. 79; *Bank of Utica v. Mersereau*, 3 Barb. Ch. R. 528; *Benjamin v. Coventry*, 19 Wend. R. 353; *Johnson v. Johnson*, 14 Wend. 637; *Jackson v. French*, 3 Wend. R. 337; *Smith v. Kerr*, 1 Barb. S. C. R. 155; *Rhoades v. Selin*, 4 Wash. C. C. R. 715; *Crawford v. McKissack*, 1 Porter, 433; *Parker v. Carter*, 4 Munford, 273; *Yordan v. Hess*, 13 John. R. 492; *Walker v. Wildman*, 6 Madd. R. 37; *Vent v. Paley*, 4 Russell, 193; *Knight v. Marquis of Waterford*, 2 Y. & Coll. 22—36; *Bolton v. The Corporation of Liverpool*, 1 M. & K. 88; *Hughes v. Biddulph*, 4 Russell, 190; *Greenough v. Gaskell*, 1 Myl. & K. 98; *Hering v. Cloberry*, 1 Phill. R. 91; *Holmes v. Baddeley*, 1 Phill. R. 476; *Wood v. Wood*, 4 Hare, 83; *Carpmael v. Powis*, 1 Phill. R. 686; *Riggs v. Denniston*, 3 John. Ca. 203, note A.; Cowen & Hill's notes to Phil. Ev. p. 277, 278, 281, 282, 283; *Wilson v. Troup*, 7 John. Ch. R. 25; S. C. 2 Cowen, 195; *Reynell v. Sprye*, 10 Beavan, 51; S. C. 11 Beavan, 618; *Reece v. Frye*, 9 Beavan, 316; *Pearse v. Pearse*, 1 De Gex & Small, 12; *Dendy v. Cross*, 11 Beavan, 91; *Criep v. Platell*, 8 Beavan, 62. Chancellor Walworth, in *The Bank of Utica v. Mersereau*, 3 Barb. Ch. R. 528, laid down these general propositions: 1, That the true principle, in reference to privileged communications between attorney and client, is that, where the attorney is professionally employed, any communication made to him by his client, with reference to the object or the subject of such employment, is under the seal of professional confidence, and is entitled to protection as a privileged communication. 2, This seal of professional confidence is not the seal of the attorney, but of his client, which the attorney is by law, as well as by professional honor, bound to keep intact; and it cannot be removed, except by the consent of the client. 3, The seal which the law once fixes upon such communications remains forever, unless removed by the party himself, in whose favor it was there placed. 4, Where the communication belongs to several clients, it seems that neither one of them, nor even a majority of them, contrary to the express will of the others, can waive the privilege, so as legally to justify the attorney in giving testimony in relation to such privileged communications, especially in a case where the testimony of the attorney equally affects the moral character of his clients, by showing that they employed him professionally to assist them in giving a fictitious judgment, for the purpose of defrauding their creditors. 5, Nor will the fact that the client, whose assent to the removal of the seal of professional confidence from privileged communications has not been obtained, is not a party to the suit in which the attorney is called upon to testify, alter the case. 6, Neither will the fact that an attorney was a subscribing witness to a warrant of attorney prepared by him for his clients to execute, alter the question as to the admissibility of his evidence tending to the conclusion that the object of giving the warrant

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fendant, in July, 1841, and the proposals to purchase by the plaintiff, through his agents, Messrs. Webb & Chapman, in Sep-

of attorney, and having judgment entered thereon, was to hinder and delay their creditors in the collection of their debts; and that the judgment was given for a much larger sum than was justly due to the judgment creditor. 7, But an attorney who is professionally employed to prepare a deed for his client, and who afterwards witnessed its execution, may be compelled not only to prove the execution of such deed, but also to testify whether it was antedated, whether it was in the same form in which it now appears, at the time of its execution, or has been altered; and whether it was actually delivered at the time he subscribed his name thereto as a witness. 8, If the deed has been lost, or is in the hands of the adverse party, who refuses to produce it upon the trial, or for the purposes of the suit, the attorney who witnessed the deed may be compelled to testify as to the contents thereof, although in the preparation of such deed he was professionally employed. 9, That the seal of professional confidence had never been held to cover a communication made to an attorney to obtain professional advice, as to the commission of a felony, or other crime which is *malum in se*. 10, The fact that an attorney was employed by his clients to assist them in a transaction which, from what was said in his presence, he must have known to be a fraud upon creditors, will not deprive their communications of the seal of professional confidence. In the case of *The Rochester City Bank et al. v. Suydam, Sage & Co.*, 5 Howard's Practice Rep. 254, it was held that the rule prohibiting the disclosure of confidential communications from a client to his attorney, does not extend to an attorney acting under a general retainer as attorney, and a general employment as agent, or factor, in relation to the debts and other property of the clients, in a certain location, where the facts disclosed consisted mainly of the instructions received from time to time, as to the management of their business. A communication, to be brought within the protection of the rule, if it does not relate to any suit or legal proceeding commenced or contemplated, should at least be made under the cover of an employment *strictly professional*, and should be such as the business to be done required to be made; it should also be of a *confidential nature*, and so *considered at the time*; and should be known to have been made with direct reference to professional business upon which it may be supposed to bear. When an attorney or counsel has an interest in the facts communicated to him, and when their disclosure becomes necessary to protect his own personal rights, he must from necessity be exempted from the obligation of secrecy. The question as to how far communications made by a client to a solicitor or counsel in obtaining his aid and advice in reference to an act of fraud, has been considered as involved in doubt, growing out of conflict in the decisions on this question. The Chancellor, in the case cited from 3 Barb. Ch. Rep. 528, remarked, "And as no one is entitled to the advice or assistance of counsel, or of an attorney, to enable him to do an illegal act, if the question had arisen for the first time in this case, I should have no hesitation in deciding that the communication made to their attorney was not privileged; because they were made for the purpose of getting his professional assistance to the perpetration of a fraud upon their creditors. It is contrary to the duty of an attorney, or a counsellor, to aid his client by his professional services, in the perpetration of a fraud, or in the violation of any law of the state, as it is to aid him in a com-

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tember, 1841. The negotiations between Dowbiggin and Webb & Chapman continued until the 28th of January, 1842, when

mission of a felony, although the moral turpitude of the act may be much greater in the one case than in the other. I can therefore see no good reason for extending the principle of privileged communications to the first class of cases and not to the last." But he held, as the practice appeared to have been otherwise for more than half a century, he did not feel authorized to adopt a new rule. He cited as evidence of the practice and rule which had been adopted: *Skin.* 404; *Holt*, 76; 1 *Lord Raym.* 733; *Holt v. Tyrrel*, *Bull. N. P.*, 284; *Cromack v. Heathcote*, 4 *J. B. Moore*, 387; *Hyde v. M——*, 1 *Moll. R.* 450, *N.*; *Doe v. Harris*, 5 *Car. & P. Rep.* 592; *Forbes v. Hall*, 12 *Pick.* 89; *Clay v. Williams*, 1 *Munf R.* 105. The cases cited sustain the Chancellor in his view of what was the rule which had been adopted. In *Coveney v. Tannahill*, 1 *Hill*, 33, Chief Justice Bronson expressed an opinion that the privileged relation of counsel and client, could only exist for lawful purposes, and hence, if the client confided to them a criminal design, or they be present when a wrong, either public or private, is done by their client, their knowledge, thus acquired, is not privileged. Chancellor Walworth, in the case of *The Bank of Utica v. Mersereau*, above cited, seems to have thought this intimation of Chief Justice Bronson was not in accordance with the rule that had been established by the cases cited by the the Chancellor. But he adds, "I admit, however, that I should have been much better satisfied, if I had found this question an open one; or, rather, if I had found the decisions of the court the other way. For I think, with the late Chief Justice of the Supreme Court, that the privileged relation of attorney and client ought to be permitted to exist only for honest purposes, but not to enable the client to perpetrate a fraud or violate the laws, under the advice of counsel, or through any other professional aid. The more modern English cases seem to favor the rule suggested by Judge Bronson, and which met with the approbation of Chancellor Walworth, had he felt at liberty to have considered the question an open one. See *Reynell v. Sprye*, 10 *Beavan*, 51; *S. C.* 11 *Beavan*, 618; *Follett v. Jeffries*, *English R.* vol. 1, edited by Bennett & Smith, of Boston; *S. C.* 20 *Law J. Rep. N. S. Chan.* 65; same case, 1 *Sim. N. S.* of Lord Cranworth's decisions, p. 1. In *Reynell v. Sprye*, 10 *Beavan*, 51, Lord Langdale, Master of the Rolls, in a case where the client penned a letter to be copied and sent to him by the attorney, as if emanating from the attorney himself, with a view of its being shown to the plaintiff, so as to lead him to sell his estate at an under value, held, that there was no privilege protecting the client or his attorney from producing the letter. Lord Langdale, after stating the facts in the case, remarked, "I have no doubt that this letter is not written in professional confidence for the purpose of obtaining the advantage of professional assistance, for Sprye, having a particular purpose in view, makes this gentleman his tool and not his adviser." The same case subsequently came before the same learned Jurist, in 11 *Beavan*, 618, when the Master of the Rolls said, "The solicitor acting as *particeps criminis*, and not in the relation of solicitor and client, is bound to produce the documents concocted between him and his client. In *Follett v. Jeffries*, 1 *Sim. Rep.*, *N. S.* p. 2, before Lord Cranworth, Vice Chancellor, a bill impeached a deed on the ground of fraud, and interrogated the defendant as to the contents of certain letters which had passed between her and her solicitor, and which, it

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the price was settled; and instructions were given by Messrs. Webb & Chapman to Messrs. Boodle & Co., to prepare an agree-

stated, showed that the deed was prepared and executed for the alleged fraudulent purpose. The defendant, in her answer, declined to set forth the contents of the letters, as privileged communications, although Lord Cranworth, in that case, was of the opinion that the transaction, according to the account given in the bill and answer, was not a fraud, and on that ground held that the defendant was not bound to set forth the contents of the letter. Yet, he was of the opinion that, if they did, the contents must have been set forth, and would not have been a privileged communication; he said, "the single question, therefore, on which I have to decide is, whether the amendments which have been made in the charges in the bill, are such as to vary the right of the plaintiff with respect to the discovery to which they are entitled; in other words, whether, adopting the language of Lord Cottenham, the plaintiffs have now, on the amended bill, made a special case, connecting the discovery sought with the fraudulent act complained of, so as to take the case out of the ordinary rule. * * For such purpose, it is essential that the act complained of should, on the face of the bill, appear to be a fraud. Such was the case of *Reynell v. Sprye*." He cited that case with evident approval; and adds, "So in the present case, if the annuity had been forfeited, not on any assignment or attempt to assign, but only on an assignment by way of sale, and the solicitor had been a party, with Taylor, to a scheme for framing a deed which should purport to be, but should not, in truth, be a sale, that would be a fraud, and both client and solicitor would be bound to discover all which had passed between them, in reference to the preparation of such deed." In a subsequent part of the same opinion, he remarked, "It may not be unfit that I should repeat an observation I made in the course of the argument, namely, that it is not accurate to speak of cases of fraud contrived by client and solicitor in concert together, as cases of *exceptions* to the general rule. They are cases not coming within the rule itself, for the rule does not apply to all which passes between a client and his solicitor, but only to what passes between them in professional confidence; and no court can permit it to be said that the contriving a fraud can form part of the professional occupation of an attorney or solicitor." On the question as to the waiver of the privilege, see the case of *Bank of Utica v. Mersereau*, 3 Barb. Ch. R. 528; *Devoy's lessee v. Burke*, 2 Fox & Smith, 191; *Merle v. Moore*, 2 Carr & Payne, 275; Howell's State Trials, vol. 21, pp. 341, 358, 408. That the secrets of his client, which an attorney or counsellor is bound to keep, are communications and instructions of his client relative to the management or defence of a cause, or about a right which has become, or is expected to become the subject-matter of dispute, and not extraneous or impertinent communications, see *Dixon v. Parmelee*, 2 Vermont R. 185; *Riggs v. Denniston*, 3 John. C. 198. That the privilege does not extend to collateral facts within the attorney's own knowledge, or to the facts which he might know without their being entrusted to him by his client, see *Hester v. Davis*, 3 Yeates, 4; *Johnson v. Daverne*, 19 John. R. 134; *Foote v. Hayne*, 1 Carr & Payne, 545; *Eicke v. Nokes*, 1 Mood. & Malk. 303; *Baker v. Arnold*, 1 Caines' Rep. 258; *Forbes v. Perrie's administrators*, 1 Har. & John. 109.

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ment for the signature of the parties accordingly. The draft agreement was accordingly prepared by Messrs. Boodle & Co., and by them handed to the defendant, who placed it in the hands of his solicitor, Mr. Murray; and the abstracts of title were laid by Mr. Murray before counsel, with a view to the introduction of such special stipulations in the agreement as the circumstances of the title might render necessary. On the 17th of October, 1842, Mr. Murray informed Messrs. Boodle & Co. that the defendant did not intend to sell the estate, and that he was directed to take no further steps in the matter. On the 24th of October, the plaintiff wrote to the defendant, and intimated that he should use every means in his power to enforce the performance of the contract; and the bill was filed on the 12th of January, 1843.

The defendant, by his answer denied that Dowbiggin had authority to sign any agreement for the sale of the estate without the concurrence of the defendant's *solicitor, [*123] or that he was authorized to do more than ascertain the terms upon which the formal contract was to be made out; and that the agents of the plaintiff knew that Dowbiggin's authority was limited in that respect; and the defendant claimed the benefit of the Statute of Frauds.

The defendant also said that he had destroyed the letters he received from Mr. Murray, but he had since obtained copies of them, and had included them in his schedule; but such letters were written by Mr. Murray to the defendant, as his solicitor and confidential adviser, and he insisted that he was not bound to produce the same.

The plaintiff moved for the production of the documents mentioned in the schedule, which consisted of certain letters that had passed between the defendant and his solicitor, Mr. Murray, in and prior to the month of July, 1842, relating to the said matters.

Mr. *Roupell* and Mr. *Spurrier*, for the plaintiff.

Mr. *Tinney* and Mr. *Howes*, for the defendant, argued that the letters between the defendant and his solicitor were privileged from discovery.

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VICE-CHANCELLOR, after stating the facts of the case, and the dates of the material communications between the parties and their agents :—

The dispute between the parties in this case dates from [*124] the 17th or the 24th of October, 1842. Before that *date the defendant had asked the advice of his solicitor in the matter of the treaty in which he was engaged ; and the question on the motion is, whether the letters from the defendant to his solicitor before that date, and therefore before the dispute arose,—although written for the purpose of obtaining advice,—and the answers of the solicitor, so far as they contain statements of fact, and not the advice or opinion itself, are privileged communications which the defendant himself will not be ordered to produce. Setting out of consideration the case upon the Statute of Frauds, the question in the cause between the parties is, whether the agreement come to on the 28th of January, 1842, was final or not ; and whether the conditions as to the title under which the estate was to be bought and sold remained, on and after that day, to be settled, in order to make a final agreement between the parties.

It is now settled that the communications between a party and his professional adviser may be privileged where the solicitor is the party interrogated, although they do not relate to any litigation either commenced or anticipated: *Desborough v. Rawlins*,^(a) *Sawyer v. Birchmore*,^(b) *Herring v. Clobery*,^(c) *Jones v. Pugh*.^(d) The extent of the privilege accorded to such communications, where the client and not the solicitor is interrogated, has been the subject of frequent controversy, and was almost unsettled so lately as the cases of *Preston v. Carr*^(e) and *Newton v. Berresford*.^(f)

The first point decided upon this subject was, that communications between the solicitor and client, pending litigation [*125] and with reference to such litigation, were *privileged : upon this there is not at this day any question. The

(a) 3 Myl. & Cr. 515.

(b) 3 Myl. & K. 572.

(c) Phill. 91.

(d) Phill. 96.

(e) 1 Y. & J. 175.

(f) Younge, 378.

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next contest was upon communications made before litigation, but in contemplation of, and with reference to, litigation, which was expected, and afterwards arose; and it was held that the privilege extended to these cases also. A third question then arose with regard to communications after the dispute between the parties, followed by litigation, but not in contemplation of, or with reference to, that litigation; and these communications were also protected: *Bolton v. Corporation of Liverpool*,^(a) *Hughes v. Biddulph*,^(b) *Vent v. Pacey*,^(c) *Clagett v. Phillips*.^(d) A fourth point which appears to have called for decision was the title of a defendant to protect from discovery in the suit of one party cases or statements of fact made on his behalf, by or for his solicitor or legal adviser, on the subject-matter in question, after litigation commenced, or in contemplation of litigation on the same subject, with other persons, with the view of asserting the same right. This was the case of *Coombe v. The Corporation of London*.^(e) The question in that suit was the right of the corporation to certain metage dues, and the answer stated that other persons had disputed the right of the corporation to metage, and that they had in their possession cases which had been prepared with a view to the assertion of their rights against such other parties, in contemplation of litigation, or after it had actually commenced. Sir J. L. Knight Bruce held, that those cases, relating to the same question, but having reference to disputes with other persons, were within the privilege; and I perfectly concur in that decision.

The case which is now before me is not within any of the cases which I have stated. I am asked to carry the *privilege further than any of those decisions have carried it. [*126]

In this case, whilst the treaty for the sale and purchase of an estate was in progress, (according to the defendant's version of the case,)—after the treaty had become ripened into a perfect contract, (according to the plaintiff's view of it,)—but, certainly, (according to the representation of both parties,) before any dis-

(a) 3 Sim. 467; S. C. 1 Myl. & K. 88.

(b) 4 Russ. 190.

(d) 2 Y. & C. C. C., 82.

(c) 4 Russ. 193.

(e) 1 Y. & C., C. C., 631.

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pute had arisen, the defendant from time to time consulted his solicitor on the subject, and written communications passed between them. The question is, whether these communications are privileged, regard being had to the circumstance that they took place before any dispute arose, though with reference to the very subject in respect of which that dispute has since arisen.

If the matter were *res integra*, I should scarcely hesitate to decide in favor of the privilege. The reasoning which applies to the case of discovery sought from the solicitor, and which I take from the case of *Greenough v. Gaskell*,^(a) would apply with equal force to the case of discovery sought from the client in this case. "If (said the Lord Chancellor) the privilege did not exist at all, every one would be thrown upon his own legal resources; deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case. If the privilege were confined to communications connected with suits begun, or intended, or expected, or apprehended, no one could safely adopt such precautions as might eventually render any proceedings successful, or all proceedings superfluous." The same opinions are reiterated in *Bolton v. Corporation of Liverpool*,^(b) which was not the case of an application against the solicitor, but against [*127] the client *himself. These authorities are strongly in point. To me, in the absence of authority to the contrary, it would appear that the privilege must be allowed, or no one can be safe: a party must otherwise be his own lawyer. The question, however, has been too often the subject of consideration in courts of equity to admit of its being dealt with (by me at least) as an open question. The case of *Radcliffe v. Fursman*^(c) is commonly referred to as the leading case upon the subject. In that case, the respondent *Fursman* sought, by her bill in chancery, to recover from the defendant the payment of a legacy, and of two bond debts. The bill charged that the appellant well knew or believed that the bonds were never paid,

(a) 1 Myl. & K. 103.

(b) Id. 94.

(c) 2 Bro. P. C. 514, Tom. ed.

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and, as demonstration thereof, that the appellant himself, or some person on his behalf, so declared or stated in some case for the opinion of counsel; and prayed a discovery. The appellant demurred to so much of the bill as required him to discover the alleged case, the name of the counsel, and the opinion given upon the case. The demurrer was overruled as to the first point, but allowed as to the second and third by Lord King; and the decision was affirmed in the House of Lords.

This decision has been disapproved by almost every Judge under whose notice it has been brought, and the courts have almost uniformly declared that it ought not to be extended: but, as Lord Brougham intimated in *Bolton v. The Corporation of Liverpool*,^(a) that being a decision of the House of Lords, there is no alternative but submission to whatever that case has decided. Now, upon that case I presume to observe, that the discussions which the subject of professional confidence has undergone in modern cases plainly show, that, at the time that case was decided, the subject was not developed to the same extent as it is at the present day; and it *may admit of [*128] a question, whether the doctrine of professional confidence, as clearly established by modern cases, can be reconciled in principle with the decision in *Radcliffe v. Fursman*. I venture also to express a doubt, whether the order in that case (an order overruling a demurrer) necessarily enforces the conclusion that the courts should, upon motion, except in special circumstances, compel any communication made by a client to his solicitor, for the purpose of obtaining legal advice, to be disclosed. The defendant in that case stood in a fiduciary character towards the plaintiff. The circumstances under which the case was stated did not distinctly appear. It is one thing, in a case so circumstanced, to decide, upon demurrer, that some answer should be given to the charges in the bill; and another, to decide that the defendant is bound in every case to give all the discovery the plaintiff may have asked, as to communications between himself and his solicitor. The demurrer admitted that the appellant, or some person on his behalf, had stated a case for the

(a) 1 Myl. & K. 95.

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opinion of counsel, and that the case so stated contained admissions important to the case made by the plaintiff upon the record: this was charged in the bill as evidence that the plaintiff knew or believed that the bond was never paid. The order overruling the demurrer decided, certainly, that, in a case so circumstanced, the court would require the defendant to give some answer to the bill, at least to the extent of stating, upon oath, what the precise circumstances were under which the case was stated; but that order did not decide that no answer which the defendant could give would entitle the case to the privilege; still less did the order in *Radcliffe v. Fursman* decide that a defendant who had made no admission, express or implied, that he ever had stated any case containing admissions favorable to the plaintiff, could be required to set forth generally what communications had

passed between him and his solicitor, for the purpose of [*129] enabling the plaintiff to *see what he could extract from

those communications. But that is the effect of an order for the production of documents admitted to be in defendant's possession, under the general charges. I may observe that, in principle, there can be no difference between cases stated for opinions, and other communications. With the cases of *Walker v. Wildman*(a) (which is a direct authority on the point, as appears upon an examination of the record) and *Clagett v. Phillips*,(b) the authorities in favor of the defendant appear to end. I lay out of the case *Preston v. Carr* and *Newton v. Berresford*, as being overruled by *Hughes v. Biddulph*, *Vent v. Pacey*, and *Bolton v. The Corporation of Liverpool*. The cases of *Preston v. Carr* and *Newton v. Berresford* are important only as showing, by comparison with later cases, the strong disposition of the courts to place the doctrine of professional confidence on a broader basis than it stood upon prior to those later cases.

In *Hughes v. Biddulph* and in *Garland v. Scott*,(c) the orders in terms would not include communications taking place before the dispute arose; but whether the orders were in fact so worded as not to go beyond what the particular case required does not appear. In *Vent v. Pacey*, many letters were stated to have

(a) 6 Madd. 47.

(b) 2 Y. & C. Ch. Ca. 82.

(c) 3 Sim. 396.

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been written by the client to his solicitor, which were not protected; but it is observable, that one only of those letters was stated to have been written in confidence, after the dispute had arisen; and the argument, as well as the order protecting that document, was confined to that alone; being, in fact, the only document for which protection was claimed. However, in *Bolton v. The Corporation of Liverpool*,^(a) two old cases prepared without reference *to the existing proceedings, were [*130] ordered to be produced; and in *Story v. Lord George Lenox*,^(b) Lord Langdale's opinion is clearly expressed, that a case not stated with reference to existing disputes is not privileged; and I cannot but think his decision in *Greenlaw v. King*^(c) affirms the same proposition, notwithstanding he apparently relies in his judgment upon the circumstance, that the case in question was not stated by the defendant to his own solicitor.

It is unnecessary that I should examine the modern cases any further: they are all of familiar reference, and are stated in the text books. Notwithstanding the disapprobation of the doctrine supposed to be established by *Radcliffe v. Fursman*, expressed in the cases of *Walker v. Wildman*, *Preston v. Carr* and *Bolton v. Corporation of Liverpool*, as reported before the Lord Chancellor, I cannot feel myself at liberty to do otherwise than hold, that if the professional privilege is to be extended beyond the limits to which the order of the court has already extended it, the order which does so ought to emanate from higher authority than mine.

I have gone at length into the subject, because I believe I am correct in saying, that in no reported case before any Lord Chancellor, does it appear that the court was called upon by the actual circumstances of the case to decide that communications like those before me might not be privileged. The orders for production in *Bolton v. Corporation of Liverpool*, and in other cases, were made in the court below, and submitted to upon the authority of *Radcliffe v. Fursman*. I am of opinion that the privilege, so far as the cases warrant it, ought *to be [*131]

^(a) 3 Sim. 467.^(b) 1 Keen, 341.^(c) 1 Beav. 137.

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upheld. Any part of the letters which contains legal advice or opinions may be protected, if the fact is brought before the court by affidavit.

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WOOD.**

1843 ; 26th, 27th, 28th, and 29th July, 4th Nov.

The testator, by his will, gave to his executors beneficially all his property which he might not dispose of, subject to his debts, and any bequests which he might afterwards make ; and made a codicil of a later date in these words:—" In a codicil to my will, I gave to the corporation of Gloucester 140,000*l.* In this, I wish my executors would give 60,000*l.* more to them for the same purpose as I have before named." No other codicil was found containing any bequest to or mention of the corporation. On a bill by the corporation, against the executors, and the Attorney-General, for payment of the 140,000*l.* and 60,000*l.*, and to have the interest of the corporation therein declared:—*Held*, that the purpose of both legacies must be deemed to have been the same, and to have been expressed in the codicil referred to, as giving the first legacy.

That, in construing the codicil, the court must exclude from its consideration the proceedings before the ecclesiastical court on the question of the admission to probate of the will and codicil.

That the plaintiffs must be regarded as admitting, in the suit, that no other circumstances proper for the consideration of this court, as affecting the claim of the corporation to the legacies, were known.

That a bequest of a legacy to an individual for a purpose expressed elsewhere, and which purpose, from some unexplained cause, is unknown to the court, creates such an uncertainty, that a court of construction cannot declare the intention of the testator.

That, although it was improbable that the legacies to the corporation were given in trust for a private person, yet there being no legal presumption that such was not the purpose referred to, the court could not presume that, because the legatee was a corporation, the legacy was therefore upon a charitable trust to which uncertainty of object would be no objection.

That the proposition that the court does not presume, and that merely precatory words do not create, a trust, supposes the whole intention of the testator, so far as it had been committed to writing, to be before the court, and that the uncertainty is occasioned by the intention which is declared ; and does not apply to a case in which, from the terms of the bequest, it would appear that there was a written expression of the intention of the testator which is not before the court, and the uncertainty is occasioned by the absence of that written declaration.

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That it being the duty of the executors to protect the interests of the residuary legatees against the claims of other persons on the estate, the circumstance that the executors were also residuary legatees was immaterial to the case.

Whether, if the plaintiffs, on the construction of the codicil which was proved, would have been held entitled to the legacies, the court would not,—before it treated the absence of the missing codicil as evidence of revocation of the legacies,—have inquired into the circumstances relating to that absence—*quære*?

Reasons for not declaring the dismissal of the bill to be without prejudice to another suit.

The Attorney-General appearing in support of a bill for a legacy,—the bill being dismissed,—held not entitled to costs.

After dismissal of a bill for a legacy, the plaintiff applied to stay the transfer out of court, pending an appeal from the decree, of a sum of stock which stood to the credit of the cause; and the court ordered that, on the plaintiffs undertaking to submit to any order the court might thereafter make for payment of interest or costs, the transfer of the fund should be stayed, with liberty to the defendants to apply for such transfer, upon security to be given by them.

In such a case, the question must be considered as if the appeal were by the residuary legatees for payment of the residue, notwithstanding an appeal from the decree by the particular legatee.

It is in the discretion of the judge to stay the execution of a decree, although a case of irreparable mischief may not be shown to be a necessary consequence of such execution.

Consideration of the difference in the effect of a decree dismissing a bill, as deciding that the position of the parties at the institution of the suit, ought not to be altered,—and a decree directing an act to be done which would vary that position.

JAMES WOOD, of the city of Gloucester, made two testamentary instruments, dated, respectively, the 2nd and [*132] 3rd of December, 1834, which were admitted to probate, as containing his will, and were then described as paper writings marked A. and B. The testator also made a third testamentary paper, dated July, 1835, which was also admitted to probate, as a codicil to the will.

Paper A. was as follows:—"Instructions for the will of me, James Wood, Esq., of Gloucester. I request my friends, Alderman Wood, of London, M. P., John Chadborn of Gloucester, Jacob Osborne, of Gloucester, and John S. Surman, of Gloucester, to be my executors, and I appoint them executors accordingly; and I desire that they will take possession of, and retain to themselves, all my ready money, securities, and personal estate, subject to the payment of my just debts, and such legacies as I may hereafter direct; and with respect to my real estate, I

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shall dispose of the same to such persons and in such parts as I shall, by my writing indorsed herein, direct. Witness my hand, this 2nd of December, 1834, James Wood."

Paper B. was as follows:—"I, James Wood, Esquire, do declare this to be my will, for disposing my estate as directed by my instructions. I declare my wish that my executors shall have all my property which I may not dispose of, and that all my estates real and personal shall go amongst them and their heirs, in equal proportions, subject to my debts and to any legacies or bequests of any part thereof, if any, which I may hereafter make. In witness whereof I have to this my last will set my hand, this 3rd day of December, 1834. James Wood."

The codicil, bearing the date of July, 1835, was in the following words:—"In a codicil to my will, I gave to the corporation of Gloucester 140,000*l.* In this I *wish that [*133] my executors would give 60,000*l.* more to them for the same purpose as I have before named. I would also give to my friends, Mr. Phillpotts, 50,000*l.*, and Mr. George Council, 10,000*l.*; and to Mr. Thomas Helps, of Cheapside, London, 30,000*l.*; and Mrs. Elizabeth Goodlake, mother of Mr. Surman, and to Thomas Wood, Smith Street, Chelsea, each 20,000*l.*; and Samuel Wood, Cleveland Street, Mile-End, 14,000*l.*; and the latter gentleman's family, 6000*l.*; and I confirm all other bequests, and give the rest of my property to the executors for their own interest. James Wood, Gloucester, City Old Bank, July, 1835."

The testator died on the 20th of April, 1836. No testamentary paper, other than the foregoing, was proved or propounded.

In November, 1841, the plaintiffs filed their bill against Sir Matthew Wood, Jacob Osborne, and John Surman Surman, the surviving executors of the testator, praying an account of what was due for principal and interest on the legacies of 140,000*l.* and 60,000*l.*, and that the defendants might admit assets, or that the personal estate of the testator might be applied in a due course of administration; and that, if necessary, the rights and interests of the plaintiffs in the said legacies might be ascertained and declared; and that a sufficient part of the stock (part of the personal estate of the testator thereinbefore referred to) might

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be transferred into court, to answer what might be found due for principal and interest on the said legacies.

The bill was afterwards amended by adding the Attorney-General as a defendant, and charging that he claimed some interest in the matters in question.

*The defendants answered separately. They stated [*134] it to be their belief, that the codicil, dated July, 1835, was a forgery, notwithstanding that the executors, in obedience to the order in council, made on the appeal from the Prerogative Court of the Archbishop of Canterbury, had taken or accepted probate thereof, together with the papers A. and B. They denied that the plaintiffs, as constituting the corporation, or in any other character or manner, were entitled to the said legacies; for they said that, if the testator ever gave any such legacies, the purposes or purpose for which such legacies were given were not, or was not, and could not be, ascertained; and, therefore, that the same were or was wholly void, and there was no one who was, or could claim to be, entitled thereto. The defendant John Surman Surman, moreover, submitted, that the legacy of 140,000*l.* must be deemed to be revoked by the revocation of the alleged codicil, referred to in the codicil or paper writing of July, 1835; and that it must be presumed that such alleged codicil was revoked by the testator in his life-time, from the circumstance that it had not been discovered after his death. The defendants, the executors, admitted assets; and, subsequently, a sum of stock sufficient to answer the legacies and costs, was transferred to the credit of the cause, without prejudice to any question therein.

The answer of the Attorney-General made no specific claim, but submitted the question to the court.

At the hearing,—Sir *Thomas Wilde*, Mr. *Swanston*, Mr. *Humphrey*, Mr. *Baily*, and Mr. *James Wilde*, for the plaintiffs.

*The points relied upon in the argument are distinctly [*135] considered in the judgment. On the construction of the codicil, the following authorities were cited on behalf of the

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plaintiffs:—*Cook v. Fountain*,(a) *Morice v. Bishop of Durham*,(b) *Hill v. Bishop of London*,(c) *Gibbs v. Rumsey*,(d) *Martin v. Douch*,(e) *Cruwys v. Colman*,(f) *Smith v. Fitzgerald*,(g) *Biblin v. Ambler*,(h) *Vaughan v. Foakes*,(i) *Wilson v. Piggott*,(h) *Commissioners of Charitable Donations v. Sullivan*,(l) *Sherratt v. Bentley*,(m) *Hinton v. Toye*,(n) *Robinson v. Tickell*,(o) *Benson v. Whittam*,(p) *Paice v. Archbishop of Canterbury*,(q) *Harrison v. Forman*,(r) *Sturges v. Pearson*,(s) *Smither v. Willock* ;(t) and , on the point that, after the passing of the Municipal Corporation Act,(u) which received the royal assent in September, 1835, the property of the corporation was held for public and charitable purposes: *Attorney General v. Aspinall*,(x) *Attorney General v. Corporation of Pool*.(y)

Mr. *Twiss* and Mr. *Wray*, for the Attorney general, argued in support of the legacies, and claimed them as given for charitable purposes: they cited *Baylis and Church v. Attorney General*,(z) *Jones v. Williams*(a) *Attorney General v. Brown*,(b) *Attorney General v. Syderfin*,(c) **Attorney General v. Heelis*(d) *Townley v. Bedwell*,(e) *Trustees of the British Museum v. White*.(f)

The *Solicitor-General*, Mr. *Tinney*, Mr. *F. Kelly* Mr. *Walker*, Mr. *Romilly*, Mr. *Hodgson*, Mr. *James Parker*, and Mr. *Jolliffe*, for the several defendants, in support of the grounds of

(a) 3 Swans. 585.

(c) 1 Atk. 620.

(e) 1 Cha. Ca. 198.

(g) 3 V. & B. 2.

(i) 1 Keen, 58.

(l) 1 Dru. & War. 501.

(n) 1 Atk. 465.

(p) 5 Sim. 22.

(r) 5 Ves. 207.

(t) 9 Ves. 233.

(x) 2 Myl. & Cr. 613

(z) 2 Atk. 239.

(b) 1 Swans. 265.

(d) 2 S. & S. 67.

(f) 2 S. & S. 595.

(b) 9 Ves. 399; S. C. 10 Ves. 527, 536.

(d) 2 V. & B. 294.

(f) 9 Ves. 319.

(h) Amb. 661.

(k) 2 Ves. jun. 357.

(m) 2 Myl. & K. 149.

(o) 8 Ves. 142.

(q) 14 Ves. 370.

(s) 4 Madd. 411.

(u) 5 & 6 Will. 4, c. 76.

(y) 4 Myl. & Cr. 17.

(a) Amb. 651.

(c) 7 Ves. 43, n.

(e) 6 Ves. 194.

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defence stated by their answers, cited many of the authorities mentioned in the preceding arguments, and cited also *Stubbs v. Sargon*,^(a) *Mills v. Farmer*,^(b) *Moggride v. Thackwell*,^(c) *Dashwood v. Peyton*,^(d) *Adams v. Adams*,^(e) *King v. Denison*,^(f) *Shelley v. Bryer*,^(g) *Browne v. Yeall*,^(h) *Wright v. Wyvell*,⁽ⁱ⁾ *James v. Allen*,^(k) *Leonard v. Leonard*,^(l) *Wheeler v. Sheer*,^(m) Jarman on Wills, Vol. 1, p. 464.

VICE-CHANCELLOR:—After stating the parties to, and the subject of, the suit, and the words of the three testamentary papers:—

By the statements in the bill, and the admissions in the answers, it appears that the three papers have been admitted to probate, and no other. The papers A. and B. are material only to be mentioned in this case, on the ground that they throw no light whatever upon that part of the third paper,—the codicil, dated July, 1835, under which the plaintiffs claim. This codicil refers to a former codicil which is not forthcoming. It is not produced, nor its absence in any way accounted for, or attempted to be accounted for in the bill. The bill simply states the existence and probate of the three papers I have read, and prays payment of the legacies of 140,000*l.* and 60,000*l.* therein mentioned, upon the construction of the language of the third and last of these papers.

The three defendants, the executors, have filed separate answers. Sir Matthew Wood, by his answer, states his belief that no such codicil as that which is referred to in the codicil of July, 1835, ever existed, and that the codicil of July, 1835, itself, notwithstanding it has been admitted to probate, is a forgery, and not the genuine act of the testator. It is admitted, however, on his part, and properly admitted, that this court, for the purposes of the present suit, must treat the codicil of July, 1835, as the

(a) 2 Keen, 255; S. C. 3 Myl. & Cr. 507.

(c) 7 Ves. 36.

(e) 1 Hare, 537.

(g) Jacob, 207.

(i) 2 Vent. 56.

(l) 2 Ba. & Be. 182.

(b) 1 Mer. 55, 99.

(d) 18 Ves. 27, 41.

(f) 1 V. & B. 272.

(h) 7 Ves. 50, n.

(k) 3 Mer. 17.

(m) 1 Mer. 72, n.

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testamentary act of the testator. And he rests his defence to the plaintiffs' claim upon this single ground,—that, if the testator ever gave any such legacies as the plaintiffs claim, the purpose for which such legacies were given is not and cannot be ascertained, and that the same are, therefore, wholly void, and no one can claim to be entitled thereto. The answer of the defendant Jacob Osborne is in substance the same as that of Sir Matthew Wood.

The defendant John Surman Surman, by his answer, also insists that the legacies are void for uncertainty, for the same reasons as are relied upon by the other defendants; and he makes another point; he insists that if a certain construction can be given to the codicil of July, 1835, yet the legacy of 140,000*l.* must be deemed to be revoked by the revocation of the alleged codicil referred to in the paper writing of July, 1835, by the testator, in his lifetime; which last mentioned revocation [*138] (he insists) must be presumed from the circumstance *of such alleged codicil not having been discovered since the death of the testator.

The attorney-general has filed a merely formal answer.

The defence founded upon the supposed revocation of the codicil referred to in the paper of July, 1835, was relied upon in argument by the counsel for each of the defendants; and it was further insisted in argument that if the legacy of 140,000*l.* was revoked in the way suggested, the legacy of 60,000*l.* must fail also,—the argument being, that, upon the true construction of the codicil of July, 1835, the purpose for which the legacy of 60,000*l.* was given was the same as that for which 140,000*l.* was given,—that, by the revocation of the legacy of the 140,000*l.* the purpose for which it was given was necessarily revoked, and that the purpose for which the legacy of 60,000*l.* was given was thereby revoked also.

In considering the arguments which were addressed to me, I am not opposing myself to any argument which was urged on the part of the plaintiffs when I say that, for the purpose of determining whether the plaintiffs have made out a *prima facie* case for the decree they ask, I am bound wholly to exclude from my consideration the litigation in another court which preceded

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the admission to probate of the three documents that have finally been established as constituting the last will of the testator. In saying this, I do not mean to intimate any opinion upon the question whether the admission of the codicil of July, 1835, to probate, must absolutely and in every imaginable case have precluded a court of construction from adverting to the circumstances under which the codicil therein referred to may have disappeared, *if those circumstances had been [*139] pleaded and brought before it; nor do I mean to decide, that, if the plaintiffs should, upon the true construction of the codicil of July, 1825, have made out a *prima facie* case for the decree they ask, and it should become my duty to consider the question of implied revocation (relied upon in Surman's answer,)—it might not be proper, before giving effect to that part of the defence, to inquire into the circumstances under which the document so referred to is not forthcoming. I mean only to say that, in considering whether the plaintiffs have made a *prima facie* case, I hold myself bound upon these pleadings to consider the plaintiffs as admitting that no circumstances are known respecting the missing codicil, or, if known, that there are no circumstances proper to be adduced for the purpose of affecting, by legal presumptions or otherwise, the construction and effect of the papers which are before me.

I think it right also to observe, with reference to some observations which were made at the bar, that I must consider this case as wholly unaffected by the circumstance that the executors of the testator are also his residuary legatees. By a rule of this court, not in accordance with its practice in some other cases, the protection of the interests of residuary legatees, against the claims of pecuniary and specific legatees, devolves wholly upon the personal representatives of the testator; the residuary legatees not being parties upon the record. If, therefore, the residuary legatees in this case had been other persons than the executors, it would have been the bounden duty of the executors, on behalf of those other persons, to have urged against the plaintiff's claim every argument which was necessary to a fair trial of that claim, and to insure the correct judgment of the court upon it. And if, in such a case, it would *have [*140]

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been the duty of the executors to defend their testator's estate against the plaintiffs' claim, I cannot possibly hold that their conduct is open to impeachment or observation, only because, being themselves the residuary legatees of the testator, they have adopted a like course of argument.

Taking these two propositions as a basis upon which my judgment in this case should be founded, I shall proceed to state the grounds upon which I have, certainly with very great regret, come to the conclusion, that the testamentary papers of the late Mr. James Wood, now before me, do not enable me, with judicial certainty, to know and declare what the intentions of the testator were respecting the legacies in question.

In order that the precise ground of the conclusion to which I have come may be understood, I shall first consider the plaintiffs' claim to the 60,000*l.*; and shall do so in the first instance upon the assumption that the plaintiffs are private individuals, and not a municipal corporation.

The first question, then, which in this view of the case naturally arises is, whether, if a testator should by a codicil bequeath a legacy to an individual, "for the same purpose as he had before named," and it should not appear when or by what means the purpose was declared, or what the purpose was, this court could decree payment of the legacy to the individual named for his own absolute use and benefit, for such would necessarily be the decree of the court if made in the plaintiffs' favor.

Now, I do not deny that a legacy to an individual "for a purpose" is consistent with his taking that legacy for [*141] "his own use and benefit. A legacy for the purpose of advancing an individual in life, for the purpose of enabling him the better to maintain and educate his family, or for any other purpose simply beneficial to the party named, are familiar cases illustrating this proposition; *Benson v. Whittam*.(a) In a late case before myself, I had occasion to apply that principle.(b)[1] It cannot, however, be denied that, the same expres-

(a) 5 Sim. 22.

(b) See *Thorpe v. Owen*, 2 Hare, 607.

[1] In the case of *Owen v. Thorpe*, 2 Hare, 607, the testator by his will devised that everything during the life of his wife should remain as it was, for her use and benefit,

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sion is,—to say the least,—equally consistent with the supposition that the purpose may have been a trust for some other than the individual named as a legatee in the will. I cannot, indeed, refuse the defendants the expression of my concurrence in the observation, that a legacy to an individual “for a purpose,”—contained, or to be contained, in some other instrument not produced or accounted for,—is a form of expression far more consistent with the supposition that a trust was intended, than that the intention was merely to benefit the legatee named,—an observation in some degree strengthened in the present case by the circumstance that the codicil of July, 1835, contains numerous legacies to individuals named, without any direct impression of a purpose for which any of them is given. It is not necessary, however, that I should found my conclusion upon either of the points I have last adverted to. The testator has given a legacy of 60,000*l.*, in his own language, “for a purpose” not contained in the paper giving the legacy, but said to have been expressed elsewhere; and the court, either by the act of the testator, or of

and after her decease he gave his real estate to his male heir, and his personal estate to her children; adding, that he gave the above devise to his wife, that she might support herself and her children according to her discretion, and for that purpose; and it was held that the widow had an absolute estate for her life in the real and personal estate. The Vice-Chancellor in that case laid down the rule, that if property be given to persons to accomplish an object, increasing their funds so that they might be the better able to do it—that is in point of fact, a gift to such persons, and there is no trust which others can enforce, and that in his opinion the cases of *Bushnell v. Parsons*, Prec. Chan. 218, per Lord Keeper Wright; *Burrell v. Burrell*, Amb. 660, were cases in support of the same proposition and in which the principle was recognized with great clearness. He also held in that case that it was equally clear, that if property be given to a parent upon trust to maintain herself and her children, although the parent takes a beneficial interest, and although to some extent there is an uncertainty as to the quantum she was bound to apply, it would be impossible for the court to hold, that the cases do not decide, that the court would find the means of measuring the extent of the children’s interest.

After referring to the cases which went to show, that where words of trust are not used so imperatively as to exclude the legatee from taking anything beneficially, that then, the difficulty of ascertaining how much that legatee was bound to give away, was a strong argument against construing the gift to be a trust. He adds, if it be a clear case of trust, then it appears to me on the authorities that the court has held that the trust shall not be void, but it will find the means of ascertaining how much the parties to be benefitted are to take.

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some other person, or by accident unexplained, is prevented from knowing what that purpose was. The language is, at the least, equally consistent with either of two intentions. In such a case

I am clear that the ordinary rules of construction acted [*142] upon in courts of justice oblige me to declare that the *uncertainty which exists as to the testator's intention is such as to prevent a court of construction from saying what that intention was, unless there be some rule of law, which, in a case so circumstanced, raises a presumption in favor of one or other of the constructions of which the words are capable, or otherwise determines the right to the legacy.

Now, it was said that in this case such a rule of law exists, raising a sufficient presumption in the plaintiffs' favor; and cases of two different classes were referred to, the principles of which it was said cleared the case of that uncertainty which, upon the words of the codicil alone, must, I think, be admitted to affect it. The principle referred to upon the authority of one class of cases was this: that a court of construction is never to presume a trust. In support of this proposition the case of *Cook v. Fountain*(a) was cited. The cases next relied upon were those in which the court has had to consider the effect of precatory words in a will, in which cases it is undoubtedly true, that, if there be uncertainty as to the person in whose favor the recommendation is expressed, or in the amount of interest that person is to take, the legatee may claim the whole for his own benefit.

Upon the cases I have referred to, the plaintiffs founded the general proposition, that if a will contains an absolute gift to an individual, that individual must take for his own benefit, unless by other parts of the will that absolute gift is with certainty reduced to a trust. Now, after repeated consideration of this case, it appears to me, as it did during the argument, that the cases referred to have no application to a case like that before [*143] me. Those cases suppose the whole intention of *the testator, so far as he has committed it to writing, to be before the court. In such cases it may be right (in the first class referred to) to hold that a gift in one part of a will to an indivi-

(a) 3 Swans. 585, 591.

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dual, in terms which, if uncontrolled by the context, would give him an absolute interest, shall not be reduced to a trust by equivocal expressions in another part of the will. And (in cases of the second class) it may be a sound rule of law that a gift which, if uncontrolled by the context, would give an absolute interest, shall not be reduced to a trust by a mere recommendation to the legatee to give an unascertained part of the legacy to an individual, or any part of the legacy to an unascertained object. But I confess my inability to apply the reasoning upon which those cases are founded to a case like the present, in which the difficulty arises from this: that the court has not the expressions of the testator before it for its guidance. I cannot accede to the proposition which was urged upon me, that because, in both classes of cases referred to, uncertainty (in a sense) is the foundation of the judgment of the court in favor of the legatee, excluding trust,—it is immaterial what the cause of uncertainty in any other case may be. The testator tells me, in the third codicil, that his ascertained intentions are declared in another place: those ascertained intentions are not before me; and the plaintiffs' argument requires me to believe that, if those intentions were brought before me, the case would necessarily fall within one or other of the cases I have mentioned. Taking this, then, as the case of a legacy to an individual, I am satisfied I should be making and not expounding a will, if I were to give the plaintiffs the decree they ask, so far as the 60,000*l.* is concerned.

Then does the circumstance that the legatee is a municipal corporation make any difference with respect to the 60,000*l.*? The argument for the plaintiffs upon *this [*144] part of the case was (in substance,) that the legacy to the corporation must have been :—first,—upon a charitable trust, —or secondly, for the use and benefit of the corporation,—or thirdly, upon trust for some private individual.

If the first were the right hypothesis, no uncertainty in the object of the charity would prevent the court from giving effect to the legacy. Then, with respect to the second supposition, it was said that, as the last statute, 5 & 6 Will. 4, c. 67, (commonly called the Municipal Corporation Act,) had subjected all property, held by corporations for their own benefit, to general pub-

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lic purposes, the legacy must be held by the corporation for some charitable use ; and, therefore, that the legacy would take effect, unless the supposition that it was given to the corporation of Gloucester as trustees for some private individual were admissible ; but this, it was said, the court would not presume. I certainly do not mean to say that I think it otherwise than highly improbable that this legacy should have been given to the corporation of Gloucester as trustees for a private individual. Morally speaking, I can scarcely bring myself to doubt but that the legacy was given for some charity in terms, or for some corporate purpose. But, unless the supposition that the plaintiffs were trustees for a private individual be so improbable as to raise a legal presumption against it, in a case like the present, I am not at liberty to reject the supposition that such may have been the purpose which the testator tells me he had before named. I do not presume that the legacy was given to the corporation as trustees for an individual ; but I do not venture, as matter of law, to presume against such a case. The absence of the missing codicil, therefore, is attended with the same consequences in this, as in the assumed case of a legacy to an individual.

[*145] *Then, with respect to the 140,000*l.*, if, upon the fair construction of the instrument, I am to understand that this legacy was given for the same purpose as the 60,000*l.*, the conclusion which I have stated respecting the 60,000*l.* will govern the legacy of 140,000*l.* also.

Now, upon the construction of the codicil of July, 1835, as applied to the purpose or purposes for which the two legacies of 140,000*l.* and 60,000*l.* were given, it appears to me that argument can really avail little or nothing. The language is simple, and the understanding is at once appealed to for its meaning. In the absence of extrinsic circumstances justifying me in raising a presumption against the executors, (and this, for the reasons already stated, I do not think myself at liberty to do,) I think it impossible for any unprejudiced mind—and it is without prejudice I am to decide this case—to read the codicil, and entertain for a moment the proposition that the “purpose named” respecting the 60,000*l.* was not contained in the codicil bequeath-

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ing the 140,000*l.*, or that the same purpose did not apply to both. By the codicil of July, 1835, 60,000*l.* *more* is given to the legatee named in the former codicil upon the *same* trusts as before named. I cannot upon such words conclude otherwise than that the two sums were to constitute an aggregate fund applicable to one and the same purpose.

It was said that, if I came to this conclusion, I should wholly disappoint the intention of the testator. That observation obviously takes for granted the point in dispute. Assuming the legacies not to be revoked, and that the codicil referred to is accidentally lost, the intention of the testator will undoubtedly be disappointed, so far as he intended to diminish his residuary estate by the amount of the legacies in question. But no rule of law *can be better settled than this,—that, un- [*146] less the legatee intended to be benefited by a particular bequest can be ascertained, the mere intention that the residuary legatees of a testator should not take will be inoperative. The whole doctrine of lapsed legacies assumes that the interests of residuary legatees are abridged only in favor of particular legatees, and if the particular legacies fail, the residuary legatees take the whole.

Many cases were cited during the argument, and if my decision was opposed to the principle of those cases, it would have been my duty to have gone through and reconciled (if I could) my decision with the obligation I am under to follow established authorities. But my decision does not impugn any of the cases which have been cited. With the exception of one or two, which I am about to refer to, I recognize the authority of the cases which were mentioned, and the principles which those cases establish. My judgment in this case proceeds upon the ground that the principles established by those cases do not apply to the case before me.

There were two cases cited upon which only I propose to make any observation. The first is the case of *Martin v. Douch and Overton*.(a)

(a) Cases in Chan. 198 (23 Car. 2)—“One Foster deviseth to the plaintiff in these words: Item. I give to my cousin Thomas Martin, clerk, late minister of Hough-

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[*147] *The statement of the facts in that case certainly brings it extremely near to the present case ; and if the reason for the judgment had not been given, the case, as reported, would undoubtedly have stood as a very strong authority for the plaintiff's claim ; but it is impossible to admit the reasoning which is found in the judgment. The ground of the judgment of the Master of the Rolls is, that the plaintiff shall take, only because it was intended the executors should not take. Now, I apprehend the rule of law is perfectly settled, that the intention to take property away from executors or from residuary legatees is unavailing, unless there is some person certain who can claim the legacy. As this was given to a party for purposes which cannot be ascertained, the mere circumstance that there was an intention to take it away from the executors is one which, according to the cases, would not at this day prevail.

The other case is *Baylis and Church v. The Attorney-General*.(a) A sum was given to the ward of Bread Street, "according to Mr. —, his will." On a bill brought by the aldermen and principal inhabitants of the ward to have the directions of the court for the application of this charity, the Attorney-General was made a defendant, and Lord Hardwicke said, "Though the aldermen and inhabitants of a ward are not, in point of law, a corporation, yet, as they have made the Attorney-General a party in order to support and sustain the charity, I can make a decree that the money may from time to time be disposed of in such charities as the aldermen for the time being and the principal inhabitants shall think the most beneficial to the ward." This case, as

[*148] I understand it, was cited in support of the *proposition, that because the legacy was to a corporation, therefore the

ton, in Northamptonshire, and living thereabouts. I do order 40*l.* to be paid him, to be disposed of for certain uses which I shall in a private note acquaint him with ; and gave him no note or direction how to dispose of it, but died ; the defendants being his executors : and whether the plaintiff should have the 40*l.*, was the question. The Master of the Rolls (Sir Harbottle Grimstone) was of opinion the plaintiff should have the 40*l.*, for that the testator did not intend it should come to his executors, but had by his will given it away from them, and he decreed the defendants to pay the 40*l.* to the plaintiff."

(a) 2 Atk. 239.

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court was to assume that it was given for a charitable purpose. Now, it is remarkable that Lord Hardwicke here expressly says, that the parties who were suing were not themselves a corporation : unquestionably, the ward of Bread Street is no corporation. It was not, therefore, the case of a legacy to a corporation : it was a gift, as I should understand it, to the inhabitants of the ward. The question would be whether that was a charity or not,—if a charity, then the question was whether the alderman and inhabitants of the ward, not being a corporation, could sue to recover it. Lord Hardwicke thought there was a doubt, but the Attorney-General being a party, he had no hesitation in making a decree to give it to charity.

For the reasons which I have stated, I have, with very great regret, come to the conclusion that this bill must be dismissed, but certainly without costs.

There is one other point to which my attention was directed, and which I have very anxiously considered : I was asked if I came to the conclusion that the plaintiffs' claim could not be established upon this record to dismiss the bill without prejudice to the right of the plaintiffs to file a new bill. It certainly is a great satisfaction to me to consider that any conclusion I can come to upon that point will be of little practical moment ; for, on a question of such magnitude, it is impossible that the decision of one court can satisfy either party ; but I have, after much consideration, come to the conclusion that I ought not to insert that reservation. The bill was filed after the lengthened discussion in the Ecclesiastical Court, and after the decision in the Privy Council. The parties had, therefore, before them every fact which could be necessary to guide their judgment, and the bill *was filed under the advice of the most able [*149] and experienced counsel. The conclusion to which they came (and I am very far from thinking that it was not a sound exercise of their judgment) was, that they should put their case simply upon the construction of the papers, without going into any collateral matters. That conclusion having been come to, upon a full view of every fact which the parties now know, I must consider that they have consented to rest their litigation upon that state of circumstances, and therefore that the

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order dismissing the bill ought to be made in an unqualified form.

Mr. *Twiss* and Mr. *Wray* asked for costs on behalf of the Attorney-General.

VICE-CHANCELLOR.—There are two questions,—whether you can have the costs out of the estate, or whether against the plaintiffs. Out of the estate I cannot give them. I know that in some very strong cases the court have given costs out of the estate, where the bill has been dismissed, but that has been upon the ground that the suit was for the benefit of the estate. It was often argued before Lord Cottenham, and I know that he was very reluctant to extend that rule; and this does not appear to me a case for it. The only question is whether the corporation of Gloucester should pay the costs. The Attorney-General does not disclaim, but appears, and has the benefit of the suit, and supported in argument the claim of the plaintiffs. I must consider the Attorney-General to be a party who claimed, and has had the benefit of the suit; and that, having failed, he stands in the same situation as the other claimants. As against him, therefore, the bill must be dismissed without costs. He is [*150] in the same situation as many other parties, for whom the Lord Chancellor has lately observed it might be proper that the legislature should make some provision ;(a) but the court cannot protect them at the expense of other suitors.

December 8th.—The plaintiffs moved that no part of the stock standing to the credit of the cause (consisting, with the accumulations, of a sum of 225,000*l.* New 3½ per Cent. Annuities) might be paid out of court until further order, and that the dividends might from time to time be laid out in the purchase of like annuities. The motion was supported by an affidavit of the solicitor of the plaintiffs, stating that the plaintiffs had been advised by counsel to appeal from the decree, and had instructed the deponent to take the necessary proceedings for that purpose,

(a) In *Appleby v. Duke*, on affirming the decree as to costs, see 1 Hare, 303.

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and that it was intended to institute such appeal as soon as the rules and practice of the court would permit, and to prosecute the same without any unnecessary delay.(a)

Mr. *Swanston*, Mr. *Humphrey*, and Mr. *Baily*, for the motion.

Mr. *Tinney*, Mr. *Walker*, Mr. *Romilly*, Mr. *James Parker*, and Mr. *Jolliffe*, for the several defendants.

*The following cases were cited on the question of [*151] the stay of execution :—*Gwynn v. Lethridge*,(b) *Hugueuin v. Baseley*,(c) *Waldo v. Caley*,(d) *Way v. Foy*,(e) *Macnaughton v. Boehm*,(f) *Wood v. Milner*,(g) *Nerot v. Burnaud*,(h) *Walburn v. Ingilby*,(i) *Storey v. Lord George Lennox*,(j) *King of Spain v. Machado*,(k) *Suisse v Lord Lowther*,(l) *Thorye v. Mattingley*,(m) and, on the argument with respect to the term, if any, which ought to be imposed, *Howe v. Earl of Dartmouth*.(n)

VICE-CHANCELLOR :—In an early stage of this cause the amount of the legacies in question was paid into court, and invested in stock in the name of the accountant-general, in trust in this cause, to abide the event of the suit. Some observations were made respecting the circumstances under which the order for paying the money into court was made ; but I think it immaterial to inquire whether the money was, in fact, paid into court with the consent of the defendants or otherwise ; for I have no hesitation in saying that, in the circumstances of this case, I should have made an order for paying the money into court whether the motion had been consented to or not. Such an order would have been in the regular course of the court in like cases. At the hearing of the cause I was of opinion that

(a) It was stated at the bar that the appeal was intended to be to the House of Lords.

(b) 14 Ves. 585.

(c) 15 Ves. 180.

(d) 16 Ves. 212.

(e) 18 Ves. 452.

(f) 1 J. & W. 48.

(g) 1 J. & W. 636.

(h) 2 Russ. 56.

(i) 1 Myl. & K. 61.

(j) 1 Myl. & Cr. 685.

(k) 1 Myl. & K. 85, n.

(l) 2 Hare, 438.

(m) 3 Y. & Coll. 254.

(n) 7 Ves. 151—Per Lord Eldon.

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the plaintiffs had not established their right to the legacy
 [*152] they claimed, and I made a decree *dismissing the bill,
 and, as a consequence of that decree, directed that the
 money which had been paid into court by the executors should
 be returned to them.

The plaintiffs now apply to me to stay the execution of so
 much of the decree as directs the return of the money to the
 executors, pending an appeal from my decree to the House of
 Lords. I have given my best consideration to the arguments
 which were addressed to me, and I am of opinion that I ought
 to accede to the plaintiffs' application, giving the defendants
 leave to apply for payment of the money out of court, in con-
 formity with the decree, upon security being given by them to
 refund the money in case my decree should be altered.

During the argument, I felt much pressed by a consideration
 of the form and nature of the decree, the execution of which
 the plaintiffs have asked me to stay. The effect of a decree
 dismissing a bill is to determine, that, at the time of the institu-
 tion of the suit, the relative position of the parties was such as
 in equity it ought to be, and remain; and it follows of course,
 where such a decree is made, that all interlocutory orders which
 have been made for the purpose only of protecting the subject-
 matter of the suit pending the litigation,—such as an order for
 the appointment of a receiver,—an order for an injunction,—an
 order for payment of money into court, and other like interlocutory
 orders which in their very nature are provisional, must drop, and
 the parties in the cause be remitted to the situation in which
 they were before those provisional orders were made. Such, at

least, must be the rule in the absence of special circum-
 [*153] stances to control it: *Walburn v. Ingilby*.^(a) A *decree
 dismissing a bill is, therefore, *prima facie* less favorable
 to an application like that before me, than the case of a decree
 directing an act to be done, whereby the relative position of the
 parties at the time of the institution of the suit is to be altered.
 The order suspending the operation of the decree in such a case
 leaves the parties in *statu quo* at the time the bill was filed. A

(a) 1 My. & K. 79.

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decree dismissing the bill in the présent case, and ordering the return of the money, does the same thing. In such a case an order suspending the execution of the decree does, in effect continue that which the court by its decree has decided to have been an infringement of the right of the party.

In point of form, therefore, I certainly have felt considerable difficulty in acceding to the plaintiffs' application. Excluding the point of form, and looking at the authorities, nearly the whole of which were noticed in the late case of *Suisse v. Lord Lowther*,^(a) I find the court uniformly treating the question as one to be governed by the discretion of the judge. And by those cases, it appears that the court does not require a case of irreparable mischief to be made out as a consequence of the execution of the decree, in order that it may apply its discretionary power in the way here proposed. In the cases of *Nerot v. Burnaud*,^(b) and *Gwynn v. Lethbridge*,^(c) the suggested inconveniences was far short of being irreparable. It also appears that where payment of money is ordered by the decree, although that is not irreparable, it may require security to be given: *Way v. Foy*,^(d) *Pycroft v. Gregory*,^(e) and *Haggart v.*

Cutts.^(f) In *Suisse v. Lord Lowther*, I *stated the difficulty which I felt from the authorities of *Walburn v.*

Ingilby and *King of Spain v. Machado*; but I was relieved from the difficulty in that case by the Lord Chancellor consenting to hear the appeal without delay. In this case I must decide the question, and I feel bound to declare that I consider the decision of Lord Cottenham, in *Storey v. Lord George Lennox*,^(g) and that of the Lord Chancellor, in *Lord Lowther v. Suisse*, together with what I know to be the opinion of the judges of this court, that, notwithstanding the cases of *Walburn v. Ingilby* and *King of Spain v. Machado*, it is the duty of the court to exercise its discretion according to the circumstances of each particular case.

Then, ought I, in the exercise of that discretion which I assume to be my guide, to accede to the plaintiffs' application?

(a) 2 Hare, 439.

(b) 2 Russ. 56.

(c) 14 Ves. 585.

(d) 18 Ves. 452.

(e) Not reported.

(f) Not reported.

(g) 1 Myl. & Cr. 685.

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The decree, it is true, merely remits the money into the hands of the executors whom the testator trusted, and through whom the plaintiffs claim, and restores the parties to the situation they were in before and at the time the bill was filed. But what is the effect of the decree in a suit like this. The executors in a suit for payment of a legacy represent the residuary legatee. A decree for the payment of the legacy would have bound the residuary legatees. Is not, then, the decree in this suit virtually a decree in favor of the residuary legatees? Is it not in effect authorizing a distribution of the estate upon the footing of the decree; and upon that principle the court in some cases has given a party, whose bill was dismissed on the ground of want of title, his costs out of the estate in which he unsuccessfully endeavored to establish an interest. Must I not, then, consider the question before me in the same way as if the plaintiffs in this suit were residuary legatees, or their *representatives asking payment of the whole residue, notwithstanding an appeal from a decree deciding against a claim for a legacy of 200,000*l.* Ought I, in such a case, to distribute the money amongst such of the residuary legatees as are living, and the representatives of such of them as are dead; leaving it to the particular legatee, if successful on appeal, to pursue the money as he best can in the various channels in which it may have been dispersed. This I think is the real question I am bound to consider, and that the form of the suit ought not to affect it. If the executors, receiving the money out of court, would not distribute it, they are not affected by the order I propose to make. If they would distribute it upon the footing of my decree dismissing the bill, the inconveniences I have pointed out all present themselves; and in considering the importance to be attached to those inconveniences, it is impossible not to admit that the amount of the stake, and the mode of its distribution, according to existing circumstances, are most material. I have asked myself this question,—If property were actually distributed amongst the two surviving executors, and the parties interested in the estates of the two deceased executors, and if I were myself plaintiff in the cause, would not the fact of that distribution amongst persons not parties in this cause,—involv-

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ing the necessity of new suits and proceedings against them—alone render the question doubtful whether the appeal was worth pursuing? Not meaning, therefore, to intimate an opinion that a decree, directing the payment of money, ought, upon light grounds to be stayed, with or without security being given by the payee, I think a sum exceeding 200,000*l.*, part of a testator's estate, ought not in this case to be distributed between the several executors and representatives of the deceased executors, pending an appeal, however confident I may feel in the conclusion to which I came.

“It is undoubtedly true that inconveniences arise on [*156] both sides: that is always the case where the court impounds money, and orders it to be laid out in the purchase of consols. The consols may fall in price, and a great loss be sustained by the party eventually entitled to the fund, and he also may be a loser in the amount of interest to be derived from the fund: that, however, is an inconvenience which the court considers as unavoidable: it treats the consols as being, in fact, a fixed and not a fluctuating fund. But I think that the court may properly require the plaintiffs to submit to such order as the court may hereafter make respecting the payment of interest and costs, in consequence of the retention of the fund under the order to be made on this motion. The defendants must have liberty to apply for transfer of the fund, upon security, and also in case the appeal shall not be duly prosecuted.[1]

The motion stood over, and the plaintiffs ultimately declined to give the undertaking required by the court.

The plaintiffs declining to give the undertaking required by the court on the 15th of December, 1843, and the 26th of January, 1844, to submit to any order the court might thereafter make for payment of interest or costs of the application of the 15th

[1] The Lord Chancellor on appeal held that the fund was not to be parted with until the appeal had been disposed of; that as the fund was invested it would not be allowed to be taken from the control of the court to be invested where it would not be under control of court. But that defendant might apply to take it out of court for the purpose of investment, and refused to make defendant liable for any loss that might arise from a fall in the funds. *The Corporation of Gloucester v. Wood*, 1 Phil. R. 493.

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of December, 1843, and consequent thereon; the court does not think fit to make any order on the motion then made, but does order that the plaintiffs do pay to the defendants, Jacob Osborne and John Surman Surman, their costs of the said application of the 15th of December, 1843, and also their costs of an application made on the 26th of January, 1844, and also of the application of the 31st of January, 1844; such several and respective costs to be taxed &c., in case, &c. And the defendants undertake not to apply to the accountant-general for any transfer of the said bank annuities until the second seal after the present Hilary term.

[*157] The plaintiffs afterwards moved, before the Lord Chancellor, that *this order might be discharged; and that, notwithstanding the decree, no part of the said bank annuities might be transferred, &c. until further order, [renewing the motion: *supra*, p. 150.] The Lord Chancellor refused the motion to stay the transfer, but gave the plaintiffs time to consider whether they would enter into the undertaking mentioned in the above order; and afterwards heard the defendants upon the questions—first, whether the plaintiffs, in their corporate character, could give any undertaking binding on their successors; and secondly, whether the undertaking ought not to extend to any loss in principal as well as interest.

JOHNSON v. JOHNSON.

1843: November, 8th, and 13th.

The 33rd section of the stat. 1 Vict. c. 26, which provides, that where a child or other issue of the testator, to whom any real or personal estate shall be devised or bequeathed, shall die in the lifetime of the testator, leaving issue, and any such issue shall be living at the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after that of the testator, does not substitute—for the pre-deceased devisee or legatee, the issue whose existence is the event or condition which excludes the lapse, but renders the subject of the gift the absolute property of the pre-deceased devisee or legatee, and therefore disposable by his will, notwithstanding his death before the death of the testator.

MICHAEL PAYNE JOHNSON, by his will, bearing date the 21st of July, 1841, gave, devised, and bequeathed all and singular his lands, tenements, and real estates whatsoever and wheresoever, and also all his money, and securities for money, and personal estate and effects whatsoever and wheresoever, unto his wife, Frances Johnson, and to her heirs, executors, administrators, and assigns, according to the nature thereof. And he

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also gave and devised unto his wife and her heirs all estates vested in him as mortgagee in fee or in trust, nevertheless, upon the trusts and purposes on which he held the same, and he appointed his wife sole executrix of his will. Michael Payne Johnson subsequently, on the 5th of July, 1842, made a codicil to his will, by which he gave his book debts to his wife and another person, as joint executrix and executor, and bequeathed several legacies; and in all other respects ratified and confirmed his will.

*Robert Johnson, the father of Michael Payne John- [*158] son, by his will, dated the 7th of January, 1842, gave and devised all that his messuage or tenement, with the appurtenances, situated in the parish of St. Martin, in the borough of Leicester, subject to any sum of money that might be charged thereon (if any at the time of his decease) unto his son Michael Payne Johnson, his heirs and assigns, for ever; and the testator Robert Johnson gave and devised certain other messuages or tenements, therein described, unto his (the testator Robert Johnson's) sons, Henry Johnson and Edmund Johnson, respectively, and their respective heirs and assigns. And the testator Robert Johnson, after bequeathing unto his son Michael Payne Johnson his gold watch, gave and bequeathed all his household goods and furniture, money and securities for money, and all other his personal estate and effects whatsoever and wheresoever, not before disposed of, unto his sons, Michael Payne Johnson, Henry Johnson, and Edmund Johnson, to be divided between them, share and share alike, subject to the payment thereof of his debts and funeral and testamentary expenses. And he appointed his sons, Michael Payne Johnson, Henry Johnson, and Edmund Johnson, his executors.

Michael Payne Johnson died on the 15th of July, 1842, leaving Frances, his widow, enceinte of a daughter, the infant defendant Frances Payne Johnson, who was born on the 11th of October, 1842. The will and codicil of Michael Payne Johnson were proved by Frances, his widow, and the other executor.

Robert Johnson died on the 27th of August, 1842. His will was proved by his two surviving sons, Henry and Edmund.

Frances Payne Johnson was the heiress-at-law, and Frances

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[*159] *Payne Johnson, Henry, and Edmund, were the next of kin, of Robert Johnson. Frances Payne Johnson, and her mother, Frances, the widow, were the next of kin of Michael Payne Johnson.

The bill was filed by Henry and Edmund, against Frances, the widow, and her co-executor, and Frances Payne Johnson, praying that the rights and interests of all parties under the bequests in the will of Robert Johnson, in favor of Michael Payne Johnson, might be declared, and the property paid to or secured for the benefit of the parties who should be declared entitled thereto; and, if necessary for such purposes, that an account of the personal estate and effects of Robert Johnson possessed by the plaintiffs, might be taken and applied in a due course of administration.

Frances, the widow, by her answer, claimed all the real and personal estate of Michael Payne Johnson, including the real and personal estate devised and bequeathed to him by the will of his father, Robert Johnson, which, she submitted, passed by the will of Michael Payne Johnson, notwithstanding his death in his father's lifetime. The answer of the infant Frances Payne Johnson claimed the same real and personal estate devised by the will of Robert Johnson; or the real estate, subject to the dower of Frances, the widow,—and a share of the personal estate, as one of the next of kin both of Robert and Michael Payne Johnson. At the hearing—

Mr. *Roupell* and Mr. *Rolt*, for the plaintiffs, as trustees, submitted to the court the question which arose on the construction of the late Statute of Wills, 1 Vict. c. 26, ss. 3, 24, and 33.(a)

[*160] *Mr. *Walker* and Mr. *Weld*, for the defendants, Frances

(a) Sect. 33, enacts—"That where any person, being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed, for any estate or interest not determinable at the death of such person, shall die in the lifetime of the testator, leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will."

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the widow, and the other personal representative of Michael Payne Johnson, argued, that the only construction of the act which can be practically followed out is, that which gives the property devised by the will of the original testator to the legatee absolutely, so as to pass by the will of the legatee, and thereby benefit his children, or issue, through, and not independently of, the legatee. Any other construction would raise a variety of subordinate questions of great difficulty. Suppose the child, contemplated in sect. 33, to die, leaving not only children but grandchildren, the court must then determine whether one class or both classes are to take—whether per capita or per stirpes? Suppose the child who should be the legatee was a daughter, and that daughter died, leaving a husband as well as issue, the question may be between the personal representative of the deceased legatee and her next of kin. The words, making it a condition that the “issue of such person shall be living at the time of the death of the testator,” do not necessarily import that the issue are to take in substitution for the parent, the original legatee. The suggested inconvenience—that the presumed intention of the testator to benefit the issue of his child in case his child should be dead, (which it is said the statute endeavors to give effect to,) may be defeated by giving to creditors the benefit of the legacy, in rendering it part of the disposable property of the legatee, and therefore liable to his debts—is a mere accident for *which the legislature does not *[161] provide. The possible bankruptcy or insolvency of the legatee is not a matter to be regarded in the construction of the statute. Under the will of his father, Michael Payne Johnson had an inchoate interest in this property, which passed by his own will to his devisee and legatee.(a)

Mr. *Kenyon Parker* and Mr. *Bacon*, for the infant defendant, Frances Payne Johnson.

It cannot be supposed that the words of the statute, which require that the issue referred to “shall be living at the time of

(a) See Jarman on Wills, vol. 1, p. 314, vol. 2, p. 727; *Griffiths v. Gale*, 12 Sim. 327.

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the death of the testator," are a mere condition, and are not intended to give the issue any benefit from the legacy. Nothing more arbitrary or capricious can be imagined, than a condition, making the benefit to the estate of the parent, and the interests of the creditors of the parent, all dependent upon the fact of whether the parent dies leaving issue or not—such issue being (as it is said) wholly uninterested in the question. The true construction of the statute is to treat it as substituting the issue for the parent, so that the legacy to the parent shall not lapse by his death. The argument for the defendant, who claims under the will of Michael Payne Johnson, fails, inasmuch as the will of Michael Payne Johnson must take effect as if executed immediately before his death ;(a) but he had not then any interest in this property, contingent, executory, or future,(b) and it is therefore impossible that any such interest could pass by his will. If the issue of the legatee be held not to take by way of substitution, the other more reasonable construction would be that

[*162] *the next of kin of the legatee shall take, according to the Statute of Distribution.

VICE-CHANCELLOR.—Independently of the points raised upon the 3d and 24th sections of the Statute, I do not think it possible to raise a question upon the construction to be given to it on this point. If the words of the statute are considered independently of the consequences particularly noticed in argument, they will not be found so unreasonable as to raise a doubt upon their effect. It is not improbable that a testator,—a father, may mean to give a provision to each of his children who shall survive him, or who, dying in his lifetime, shall leave a family existing at his (the testator's) death. If any of his children should leave a family to be provided for, he may reasonably intend to give to such child the same power of regulating, as between the members of his own family, what they shall severally take, as he would have had if he had survived the testator. That is neither an irrational nor an improbable purpose. The 33d section of the act provides, that, in the case supposed, such devise or be-

(a) St. 1 Vict. c. 26, s. 24.

(b) Id. s. 3.

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quest shall “not lapse.” If the section had stopped there, the meaning might have been open to argument; but even then I should have said that it was obviously intended to carry out the intention which I have noticed. The act, however, goes on to say, that the bequest “shall take effect;” thus affirmatively expressing what was meant by the enactment that the bequest shall not lapse. The intention of the testator himself is to take effect in the same manner as though the legatee had died immediately after the death of the testator; and, therefore, this bequest to the son is to take effect as if the son had died after the testator.

*The next question is, as to the consequences of giving such effect to the words of the statute. Those consequences are the same as if the law were applied to a case, in which, independently of this act, a person to whom an estate devolved had happened to die immediately after the devolution. In such a case, the testamentary power would necessarily attach. It also attaches in this case, subject to the question which is raised in argument upon the 24th section,—whether that clause, stating that the will shall operate from his own death, will permit it to operate on property which he acquires in this way; and this again depends upon the question whether the property is (within the description of the 3rd section) property over which the legatee has a testamentary power.

Nov. 13.—VICE-CHANCELLOR:—I stated my opinion at the conclusion of the argument, that, upon the construction of the 33rd section of the stat. 1 Vict. c. 26, taken alone, a legatee within that section would take the same provision under his father’s will, and with the same powers and incidents of property, as if he had actually survived the testator; and that it was not intended that the issue of such legatee should take the bequest independently of the legatee. The existence of the issue, I think, was the motive of this provision of the legislature, but the issue was not the object of it. It was argued by Mr. Bacon, that, if this proposition were in other respects correct, it was incorrect so far as it would give the legatee a testamentary power over his legacy. In support of this argument it was said that the 3rd section of the act

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empowered parties to dispose by will of such interests only as they had at the time of their natural death ; and that that section could not be construed to extend to property which [*164] did not in any sense accrue *to the testator until after his natural death. Without admitting that the words of the 3rd section, taken alone, do not sufficiently describe a future accruing interest, like that under consideration, I think the legatee has, upon the true construction of the whole act, a testamentary power over it. The 3rd and 24th sections make the will speak from the death of the testator ; and the 33rd section in effect declares, that, in the circumstances contemplated by that section, the child shall be taken to have died on a day later than his natural death.

Being of opinion that the intention of the 33rd section was that which I have before expressed, I have no doubt of the propriety of extending the fiction introduced by the 33rd section to all cases of testamentary disposition under the other clauses of the act.

It occurred to me during the argument that the construction to be put on the act might be affected by the cases of *Daniel v. Dudley*,^(a) *Palin v. Hills*,^(b) and cases of that class ;—where a testator has in terms declared that a legacy given by his will, in case of the death of the legatee, shall go to the executors and administrators, or to the personal representatives of the legatee,—in one sense providing against a lapse. In those cases, however, it appears to me that the court has gone entirely upon the probability of an intention to be attributed to the testator when he has in terms given the legacy, in the events supposed, not to a party himself, but to the representatives of that party ; and not, as in this case, where the legacy is expressly saved to the party himself. I mention those cases, that it might not be supposed I have overlooked them. I think they do not apply to this question.

[*165] *This cause, &c., upon hearing the probate of the will of Robert Johnson, the original testator in &c., and the probate of the will and codicil of Michael Payne Johnson, the other testator in &c., this court doth declare that so much of the

(a) 1 Phil. 1.

(b) 1 Myl. & K. 470.

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residuary personal estate of Robert Johnson, the &c., as was bequeathed to Michael Payne Johnson, since deceased, by the will of the said testator, vested in the said Michael Payne Johnson, with a power of disposing thereof by will; and that, under the will and codicils of the said Michael Payne Johnson, the testator, in the pleadings also named, the defendant Frances Johnson, widow of &c., is entitled to such personal estate as aforesaid. [Costs to be taxed and retained and paid by the plaintiffs out of the general personal estate of Robert Johnson.] And the defendants, Frances Johnson, widow, and W. Dalton, the executrix and executor, &c., waiving any accounts against the plaintiffs as offered by the bill, it is ordered that the plaintiffs be at liberty to transfer and pay one-third part of the residuary personal estate of Robert Johnson to the defendant Frances Johnson, widow, the executrix of Michael Payne Johnson, deceased. Liberty to apply.

GREEN V. PLEDGER.

1844;—10th, 24th, and 29th February.

The leave of the Court is necessary in order to serve personally a party out of the jurisdiction with notice of a motion in a cause, although such party has been served out of the jurisdiction, under the stat. 4 & 5 Will. 4, c. 82, with the subpoena to appear and answer, and an appearance has been entered for him in the suit under that statute.[1]

If a party in a suit may be served out of the jurisdiction, under the stat. 4 and 5 Will. 4, c. 82, in respect of any part of the subject of the suit, the service is good for all the other purposes of the suit.

It is not open to one defendant, on an interlocutory application, to object to the irregularity of the service of, and appearance by, another defendant, if such other defendant, having notice of the application, does not himself object on the ground of such irregularity.

The court having interfered by injunction to restrain the payment of a legal debt, admitted by the debtor to be due to the nominal creditor, has then jurisdiction to decree payment of the debt against the debtor, without sending the party entitled to the payment to recover it by the use at law of the name of the nominal creditor.

Circumstances under which the answer or disclaimer of one defendant may entitle the plaintiff to a decree in the cause, as against another defendant, although the answer or disclaimer of one defendant is not evidence against the other.

[1] As to substituted service of subpoena, see *Hobhouse v. Courtney*, 12 Sim. 140; *Noad v. Backhouse*, 2 Y. & C. 529; *Norton v. Hepworth*, 1 Hall & Twell, 158; *Weymouth v. Lambert*, 3 Beav. 333; *Murray v. Vipart*, 1 Phil. 521; *Hornby v. Holmes*, 4 Hare, 306; *Cooper v. Wood*, 5 Beav. 391.

1844.—Green v. Pledger.

THIS was a motion for payment into court of the sum of 500*l.*, due upon two promissory notes, one dated the 22nd of September, 1836, for the sum of 200*l.*, and the other dated the 16th of October, 1836, for the sum of 300*l.*, both made by the defendant William Pledger, and both payable to the defendant John Angle; and also for an injunction to restrain John Angle from [*166] indorsing *the notes, so as to make them payable to any person other than the plaintiffs, and from taking proceedings at law to recover the amount due thereon from the defendant Pledger.

The facts of the case appear fully upon the judgment.

Mr. *Wood*, for the motion.

Mr. *Anderton*, contra.

VICE-CHANCELLOR:—The plaintiffs are the official assignees and the creditors' assignees of Bernard Angle, a bankrupt. The defendant William Pledger is the maker of two promissory notes, one for 200*l.*, and the other for 300*l.*, both payable to the order of John Angle.

The case made by the bill is, that Bernard Angle, the bankrupt, for the purpose of withdrawing his property from his creditors, placed it in the hands of his brother John Angle; and that John Angle has invested part of the assets of the bankrupt in the purchase of public stocks and funds of Great Britain, and lent other parts of such assets upon the security of promissory notes; that the monies due upon the said two promissory notes for 200*l.* and 300*l.* are part of the assets of the bankrupt, which were lent by John Angle to Pledger with notice of that fact; that John Angle, having been summoned to attend as a witness to be examined under the fiat against Bernard Angle, refused to attend, and ultimately absconded and went to Boulogne, in France, where he now remains.

The two promissory notes are stated to have been found [*167] in the possession of John Angle by the messenger *under the fiat,—to have been taken possession of by such messenger and delivered to the plaintiffs. It is said, also, that

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John Angle, in December, 1836, brought an action of trover against the plaintiffs for the notes, and also an action of trespass; but the actions were not prosecuted, and in March, 1838, the defendants in the actions obtained judgment of non-suit: that the notes, not being indorsed by John Angle, the plaintiffs cannot recover upon them at law, and that Pledger refuses to pay to the plaintiffs the sums due upon the notes.

The object of the suit is to recover the moneys due upon the two notes; and to recover any stock belonging to the bankrupt now standing in the name of John Angle, and also all other property of the bankrupt held by John Angle. And the bill prays an injunction to restrain John Angle from indorsing the notes, except to the plaintiffs, and from proceeding at law against Pledger.

The defendant Pledger has appeared and answered. He admits, without reserve or qualification, his liability to John Angle upon the notes, except as to a sum of 52*l.* 10*s.* which he claims as a set-off. He ignores altogether the case of the plaintiffs, not admitting that the money due upon the notes forms part of the assets of the bankrupt. He submits that he has not been, and is not now, bound to pay the two sums of 200*l.* and 300*l.*, until lawfully called upon to pay the same to some person duly authorized to receive, and to give a discharge for such sums. He submits, whether he is properly made a defendant to this suit, and whether the plaintiffs are entitled to any relief against him upon this bill. But if the court should be of opinion, that, in the result of this suit, the plaintiffs are entitled to the two notes, or the beneficial interest in or to the same, then he submits, *that he ought to be considered a stakeholder, and [*168] allowed the 52*l.* 10*s.* and his costs.

Under the late statute,(a) the defendant John Angle was served at Boulogne with the subpoena to appear to and answer the bill; and an appearance was afterwards entered for him under the same statute.

In this state of the cause, in January, 1844, a motion was made by the plaintiffs that Pledger might be ordered to pay the

(a) Stat. 4 & 5 Will. 4, c. 82.

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amount of the two notes with interest into court; that the same, when paid in, might be laid out, and that John Angle might be restrained by injunction from indorsing the notes except to the plaintiffs, and from proceeding at law upon the notes against Pledger.

When the motion came on, it appeared that the plaintiffs had, without the leave of the court, served the notice of this motion upon John Angle, at Boulogne; but, as I was of opinion that such service, without the leave of the court, could not be treated as good service, the motion was ordered to stand over; and afterwards, on the 10th of February, 1844, I made an order, upon the plaintiffs' application, that service of the notice of motion upon John Angle at Boulogne should be deemed good service. The notice of motion has since been served upon John Angle at Boulogne, and the motion came on before me upon affidavits as against John Angle, who did not appear, and upon the answer of Pledger.

The effect of Pledger's answer I have already stated. The effect of the affidavits, as between the plaintiffs and John [*169] Angle, admits of no doubt. If an answer *admitting that which appears upon the affidavits were put in by John Angle, a decree as against him would be of course, for it would be admitted that the money lent upon the two notes, as well as the other money in question, was in fact the bankrupt's money. If John Angle appeared upon this motion, and no affidavit was offered in answer to the affidavits now before the court, the question would be equally concluded for the purposes of the motion. And where the defendant has been duly served with notice of the motion, and will not appear, I must consider the case to be the same as between the plaintiffs and him, (John Angle.)

The question, then, is upon the objections raised by the defendant Pledger.

One objection was, that the service of the subpoena, and the entering the appearance, were not authorized by the statute.^(a) The answer to this objection is, that the suit does, as to some

(a) Stat. 4 & 5 Will. 4, c. 82.

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parts of the matters, relate to "money invested in government or other public stock ;"(a) and if service be good *quoad hoc*, the service will be good for all the other purposes of the suit. But if the defendant who is so served does not object,—if he waives the irregularity, (if any there be,)—it is like an appearance *gratis*. The other parties cannot, in that case, complain of the manner in which the appearance of that defendant has been enforced or recorded.

It was then said that the liability of Pledger was purely a legal question, and that this court would not try it, or do more than allow the plaintiffs to use the name of John Angle. I will not say how the case would have been if the defendant Pledger had suggested that "there was a question, how- [*170] ever slight, as between himself and John Angle. That, however, is not his case ; he asks only that he may not pay to any one who cannot give him a discharge, and that the court is bound to attend to. But he is not so wild or regardless of his own interests as to subject himself even to the risk of costs, by raising any question between himself and John Angle ; and, in such a case, the court will not *pro forma* only, send the case to law where there is nothing to try. In the late case of *Pearce v. Creswick*(b) the jurisdiction of the court was exercised on similar grounds. Pledger was properly made a defendant, with a view to the injunction ; and if there was a case to be tried at law, the court would have been bound to regard the claim of Pledger ; but no such case has been raised.

It was suggested that the defendant Pledger has not admitted that the notes in the hands of the plaintiffs are the same notes which he (the defendant) signed ; and that the proper course would have been for the plaintiffs to have deposited the notes with the clerk of records, and have called upon the defendant to inspect them, and upon such inspection to admit or deny that they are genuine. The notes are, however, verified by affidavit on the part of the plaintiffs, and there is no suggestion that there are any other similar notes in existence. It is the same as the case of an admission of a certain deed upon the answer ; the

(a) *Id.*, sect. 1.

(b) 1 Haro, 286.

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production of a corresponding instrument, there being no suggestion that there is any other or counterfeit instrument, is, in practice, treated as sufficient.

Then comes the sole point of the case which, since the argument, I have had to consider. It was said that the [*171] *court can only make the order for payment of money into court upon motion, where the admission which can be read from the answer gives the plaintiff at least the right of sustaining the suit against the defendant; and the case of *Dubless v. Flint*(a) was adverted to, as affirming that principle. To the authority of that case I entirely defer, and I have always followed it in practice;(b) but I shall not violate that principle, if, upon a record framed as this is, I receive the affidavits made on behalf of the plaintiffs upon this motion. Has not the defendant Pledger given the admission which the principle of that case requires? If John Angle were not a party to this record, or if, being a party, it were necessary to the decree which the plaintiffs ask that issue should be joined between the plaintiffs and Pledger upon the point which it is the object of these affidavits to prove,—i. e. the interest of the plaintiffs in the notes, as between himself and John Angle, the case of *Dubless v. Flint* might apply; but that is not this case. The defendant Pledger admits his liability to John Angle, and ignores only the question of right as between the plaintiffs and John Angle. If John Angle were not a party to this suit the plaintiffs would have to join issue with Pledger upon their right as against John Angle, and would be bound to prove that right as against Pledger. But the latter being a party, it is with him and him only that the plaintiffs have to litigate that right; and a decree in the plaintiffs' favor against John Angle will be a sufficient protection to Pledger. That it is only with John Angle the plaintiffs have to litigate that question is clear from the consideration that an admission by John Angle, in his answer, of the plaintiffs' right as against himself, would entitle the plaintiffs to a decree according to the prayer of the bill. At the same time it is clear [*172] that John Angle's answer *would not, technically speak-

(a) 4 Myl. & Cr. 502.

(b) See *Topham v. Lightbody*, 1 Hare, 289.

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ing, be evidence against Pledger. So, if the bill were taken *pro confesso* against John Angle; or if the plaintiffs' rights as against John Angle were proved by evidence not receivable against Pledger. The consequence of both John Angle and Pledger being parties to the suit is, that a decree in the plaintiffs' favor will decide the case between the co-defendants: *Chamley v. Lord Dunsany*,^(a) *Farquharson v. Seton*.^(b) I might refer to analogous cases, in which a disclaimer by one defendant has enabled the plaintiff to sustain his suit against another defendant; the principle being, that, after decree founded upon the disclaimer, the court would not permit the disclaiming party to open the question anew.^(c)

In order that *Dubless v. Flint* should resemble this case, the heir-at-law (admitted to be so by the trustee) should have been a defendant, and the plaintiff claiming under such heir should have been admitted by the heir to be such assignee. Lord Cottenham did not decide that in such a case the court would not have ordered the money to be paid into court. And if the admission of the heir would have given such a right, I do not see how Pledger can complain that I receive affidavits against another defendant, who, having notice of the motion, will not appear upon it. I want no evidence against Pledger but what his answer gives me, and I take nothing from him but what he admits he has no right to hold as against John Angle. Against John Angle the case is established, for the present purpose at least, by affidavits to the reception of which he could not object.

*The cases of *Montagu v. Hill*,^(d) *Lord Portarlington v. Graham*,^(e) and *Thorpe v. Hughes*,^(g) which were cited, have no application to this case. In those cases the party sued at law was the debtor and the plaintiff in equity, who sought to restrain proceedings against himself: here the object of the injunction is to restrain a party—who is in the situation of a trustee, or owner at law of that which is in equity the pro-

(a) 2 Sch. & Lef. 718.

(b) 5 Russ. 45. Per Lord Eldon.

(c) See *Leathes v. Newitt*, 3 Ea. & Yo. 848; *Williams v. Jones*, Younge, 252; *Mounsey v. Burnham*, 1 Haro, 21.

(d) 4 Russ. 128.

(e) 5 Sim. 416.

(g) 3 Myl. & Cr. 472.

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perty of the plaintiffs—from suing not the plaintiffs, but the debtor, who is a co-defendant.

The defendant Pledger was ordered to pay the sum of 500*l.* (deducting thereout 52*l.* 10*s.* claimed by him) into court. No order made as to payment into court of interest, or as to retention in respect of costs, one being, for the present purpose, by arrangement, set off against the other. Injunction against John Angle.

BROWNE v. AMYOT.

1844 : March 12, 22.

The stat. 4 & 5 Will. 4, c. 22, for the apportionment of rents and other periodical payments, applies to cases in which the interest of the person interested in such rents and payments is terminated by his death, or by the death of another person; but does not apply to the case of a tenant in fee, or provide for apportionment of rent between the real and personal representative of such person, whose interest is not terminated at his death.

THE bill was filed by two of the next of kin against the administratrix, who was also the heiress-at-law of Edward Colman; and it stated that Jane Colman, being seised in fee-simple, and entitled, according to the custom of the manor, to an estate of inheritance in a certain freehold and copyhold farm at Bressingham, in the county of Norfolk, by her will, dated in February, 1830, devised the same unto her grandson, the said Edward Colman, and his heirs, if and when he should attain the [*174] age of twenty-one years, with power for Thomas Amyot and Adam Taylor, the executors and trustees appointed by her will, during the minority of Edward Colman, to demise and lease the said hereditaments for any term not exceeding eight years in possession; and that the testatrix, Jane Colman, died in October, 1834, leaving Edward Colman, then a minor surviving.

The bill stated, that, by indenture, dated the 6th of December, 1834, Thomas Amyot and Adam Taylor, in pursuance of the said power, duly demised and leased the said farm and hereditaments at Bressingham unto Isaac Eaton, his executors and

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administrators, for the term of eight years, from the 11th of October then last, (and to hold the copyhold parts of the same premises from year to year,) yielding and paying the clear yearly rent of 117*l.* 12*s.*, by equal half-yearly payments, on the 6th of April and the 11th of October in every year.

The bill stated that Edward Colman attained his age of twenty-one years in November, 1838, and that Edward Colman was then and thenceforth, up to the time of his death, seised of or otherwise well entitled to certain other freehold and copyhold farms and lands therein described, situated in the counties of Norfolk and Suffolk, as to the freehold parts for an estate of inheritance in fee-simple, and as to the copyhold parts thereof for an estate of inheritance to him and his heirs, according to the custom of the manors of which the same were held : and that, by several indentures, dated respectively the 21st of August, 1839, and the 12th of March, 1840, Edward Colman demised the same freehold and copyhold farms respectively unto the persons therein respectively named, and their respective executors and administrators, to hold the same unto them and their respective executors, administrators, and assigns, from the 11th of October, *1839, for the respective terms of eight, twelve, and [*175] fourteen years, and to hold the copyhold parts of the same premises respectively from year to year, yielding and paying the several respective yearly rents of 120*l.*, 210*l.*, and 75*l.*, by equal half-yearly payments, on the 6th of April and the 11th of October in every year.

The bill stated that Edward Colman died on the 2d of April, 1842, intestate, and without having been married, and that he left the defendant Jane Amyot his heiress-at-law, and the said Jane Amyot and the plaintiffs, Philip Browne, and Mary the wife of the plaintiff Henry Steele, his next of kin ; and that the defendant Jane Amyot had obtained letters of administration of the personal estate and effects of the intestate, and had, since his decease, possessed herself of all the personal estate whereof he was possessed at the time of his death, other than such parts thereof as consisted of the rents of the said farms ; and had in like manner possessed herself of such of the said rents which accrued due on or previously to the 11th of October, 1841, as

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were remaining unpaid at the decease of the intestate ; and that she had, out of the personal estate of the intestate so possessed by her as aforesaid, paid the funeral and testamentary expenses and debts of the intestate, and had duly distributed the residue of the intestate's personal estate so possessed by her amongst the persons entitled thereto.

The bill then stated that the defendant Jane Amyot had also possessed herself of the rents of the said farms which accrued due on the 6th of April, 1842, being the first period of payment thereof next after the decease of the intestate ; that the plaintiffs were entitled to the distributive share of a proportion of the said last-mentioned rents, according to the time which [*176] elapsed from the 11th of October, 1841, up to and including the day of the death of the intestate, and that they had applied to the defendant Jane Amyot to pay to them respectively their said distributive shares, which she refused to do, and that she claimed to be entitled to the said rents for her own benefit as heiress-at-law of the intestate.

The bill prayed that an account might be taken of the rents of the intestate's said farms which accrued due on the 6th of April next after his death, and that plaintiffs might be paid a distributive share of a proportion of such rents, according to the time which elapsed from the 11th of October, 1841, up to and including the day of the death of the intestate.

The defendants, Jane Amyot and her husband, demurred for want of equity.

Mr. *Rolt* and Mr. *Gordon Whitbread*, for the demurrer.

The law on apportionment of rent may be considered with reference to three cases : 1. Where a tenant in fee dies, and neither his interest nor the interest of the lessee terminates on that event, but the question of the title to the rent from the time of his death to the ensuing day of payment is raised between his real and personal representative : 2. Where the interest of the party entitled to receive the rent (as the tenant for life of the estate) determines on his death, but the interest of the lessee is not terminated by that event ; as, for example, where the tenant for life

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has taken the estate subject to a lease which outlives his life-interest, and had been created by the previous owner in fee-simple : 3. Where the interest of the party entitled to receive the rents, *and the lessee or party bound to pay them, [*177] determines by the same event,—as, in the case of a lease created by a tenant for life, beyond, or without, a power for that purpose. In the first of these cases, the common law, according to which the heir at law takes the rent, as inseparable from the reversion, is not affected by either of the statutes 11 Geo. 2, or 4 & 5 Will. 4. In the second case, the rent, being incident to the reversion, became, after the death of the tenant for life, without any doubt or question, the right of the reversioner, until the statute of the 4 & 5 Will. 4, c. 22. In the third case, it was equally clear that,—the interest both of the party to receive, and the party to pay rent, determining by the same event, the latter altogether escaped from the payment of rent. This was the mischief against which the statute 11 Geo. 2, c. 19, s. 15, was designed to provide.(a)

The preamble of the statute 4 & 5 W. 4, c. 22, mentions doubts, which are to be removed by declaration, and inconveniences, which are to be remedied by enactment. As to the first class of cases, there was no doubt—it was always clear that the heir, and not the executor, took the rent. There was neither inconvenience nor evil in his doing so ; it was the law of inheritance ; it was no more an evil than are the laws which govern the descent of real and personal property. It is in the dominion of the tenant in fee simple to deal with his estate as he will. Even the accidental consequence, that his real estate might not, owing to his death intestate, be subject to his simple contract debts, could no longer be suggested, for a prior statute(b) had rendered real estate assets in equity ; and, had it been otherwise, it is not thus that the legislature could be supposed to have intended *to bring real estate within the reach [*178] of creditors. In the second class of cases, there were no doubts to be removed, but there was much of inconvenience. A tenant for life, as the statute expresses it, “ whose income was

(a) 1 Swan. 340, n., Id. 355.

(b) 3 & 4 Will. 4, c. 104.

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wholly or principally derived from rents," and other periodical payments, lived almost up to the day when the payment became due,—relied upon that source of maintenance, when, by the accident of his death, the operation of the law was to take from him that inchoate right which he had acquired, and wholly deprive him of his income from the last rent day. In the third class of cases, there was both doubt and inconvenience, to which the statutes properly apply.(a)

The "tenant in fee simple," mentioned in the second section, refers to the person by whom the lease is made; not the person who has the interest referred to. The words "the death of any person interested in any such rents" do not suitably describe the estate or interest of the tenant in fee. The "death" of the person interested is assumed to be one means of determining the interest; the "determination by any other means" of such interest, which may be by the death of the cestui que vie, equally assumes that it is to be a case where the interest does in some way determine; and, therefore, cannot apply to the case of the absolute owner or tenant in fee, whose interest does not determine by his death. If the statute were held to apply to the heir in this case, it must equally apply to a devisee,—if to a devisee, it must apply to a specific legatee of stock, as against whom apportionment of dividends may be insisted upon; and many questions will arise in the administration of estates which were certainly not contemplated by the legislature. They cited *Oldershawe v. Holt*.(b)

[*179] *[It was also argued, that the enacting clause of the act should be construed with reference to the preamble. *Ryall v. Rowles* ;(c) *Ash v. Abdy* ;(d) *Salkeld v. Johnson*.(e)]

Mr. *Romilly* and Mr. *Baily*, in support of the bill.

The effect of the argument against the apportionment in this case is, to strike out the words "tenant in fee" from the act, for these words would, at least, be unnecessary, and, according to the true construction of the defendants, have no other result than

(a) See *Ex parte Smyth*, 1 Swan. 337, and Id. 340, et seq.

(b) 12 Ad. & Ell. 590, per Coleridge, J. (p. 596.)

(c) 1 Ves. 364, 365.

(d) 3 Swan. 664.

(e) 1 Hare 207, 208.

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that of creating an ambiguity. On the other hand, supposing that it was desired to express the meaning which the plaintiffs contend that the act should receive, it will be found very difficult to convey that meaning in other terms, or in terms not liable to a similar question. The plaintiffs rely on the express words of the statute, and claim, under those words, their apportioned share of rents from "the death of the person interested," and under whom they derive their right. Another effect of the construction for which the defendants contend is, that a devisee for life, succeeding a tenant in fee, will not only take the whole rents for the period in which the tenant in fee dies, but will also take the apportioned rent up to the time of his own death,—an advantage given to one of the successive possessors of the estate over the others, which is entirely capricious, and not to be lightly attributed to the legislature. They mentioned *In re Markby*.(a)

VICE-CHANCELLOR.—The question arises,—between the heir and personal representative of a tenant in *fee [*180] simple,—whether, under the statute 4 & 5 Will. 4, c. 22,(b) the rents payable by the husbandry tenants are apportionable between such heir and personal representative.

The cases showing the state of the law prior to that act are collected in Mr. Swanston's very elaborate note to the case of *Ex parte Smyth*.(c)

The statute 4 & 5 Will. 4, c. 22, begins by reciting the statute 11 Geo. 2, c. 19, s. 15, under which the executors or administrators of a tenant for life, who happened to die before or on the day on which any rent was reserved or made payable upon a demise or lease which determined on the death of such tenant for life, was enabled to recover the whole or a proportionable part of the rent. The statute then recites a doubt whether the provisions of that act apply to every case in which the interests

(a) 4 Myl. & Cr. 484.

(b) An act (familiarily known as Mr. Poulter's Act) to amend an act of the 11 Geo. 2, respecting the apportionment of rents, annuities, and other periodical payments.

(c) 1 Swan. 337.

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of tenants determine on the death of the person by whom such interests have been created, and on the death of any life or lives for which such person was entitled to the lands demised ; and that it is, therefore, desirable that such doubts should be removed by a declaratory law : And (after intermediate recitals, to which I will immediately refer) the act, by the first section, declares (in effect) that all rents reserved and made payable in leases which determine on the death of the person making them, or on the death of the life or lives for which such person was entitled to the lands demised, shall be within the provisions of the act 11 Geo. 2, c. 19. This is the whole that is enacted by the first section of the act 4 & 5 Will. 4, c. 22, and it applies only to cases in which the interest of the tenant determines.

[*181] *In the preamble in the first section, however, other cases are mentioned to which it is proposed that the law of apportionment shall be made applicable, and to those cases the enactments in the second section exclusively apply : the question is, whether the present case is one of those which fall within that section.

The preamble in this respect is as follows : “ And whereas, by law, rents, annuities, and other payments, due at fixed or stated periods, are not apportionable (unless express provision be made for the purpose,) from which it often happens that persons (and their representatives) whose income is wholly or principally derived from these sources, by the determination thereof, before the period of payment arrives, are deprived of means to satisfy just demands, and other evils arise from such rents, annuities, and other payments not being apportionable, which evils require remedy.”

From this preamble it is manifest that one class of cases with which the legislature proposed to deal were those in which persons having life estates only, in rents, annuities, and other payments, due at fixed or stated periods, lost the whole of a periodical payment by dying before the entire payment had become actually due. But the preamble goes further and says, that other evils arise from the rents, annuities, and other payments, not being apportionable ; leaving it doubtful whether those other evils apply to cases of a similar kind, or to cases of a dif-

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ferent class. The result, therefore, is, that the preamble is general, and the expressions of the enacting clause must determine the case.

It was, I think, admitted in argument,—but, if not admitted, I am prepared to express my opinion,—that no legitimate argument in favor of the claim of the executor *or per- [*182] sonal representative in this case can be drawn from the circumstance, that a tenant in fee simple is spoken of, in the second section, as the party (amongst others) supposed to grant the lease upon which the rent afterwards to be apportioned is reserved. The origin of the lease upon which the rent is reserved is obviously not one of the elements upon which the question of apportionment is to depend. It is equally clear that the act contemplates, amongst other cases, the case of a tenant in fee simple, who, after having granted a lease or leases, shall by settlement, will or otherwise, give a life estate, or other determinable interest, to a party in whose favor the apportionment is to take place. I do not say that the act contemplates that case alone, but that it tacitly supposes such a dealing with the estate may take place, is manifest from the words of the act, and it provides an apportionment for such a case.

The question is, whether the act applies to any cases except those in which the interest of the party entitled to the rents, annuities, or other periodical payments, determines by death or some other means. The second section enacts, that thenceforward “all rents service reserved on any lease by a tenant in fee or for any life interest, or by any lease granted under any power, (and which leases shall have been granted after the passing of this act,) and all rents charge and other rents, annuities, pensions, dividends, moduses, compositions, and all other payments of every description, in the United Kingdom, made payable or coming due at fixed periods, under any instrument that shall be executed after the passing of this act, or (being a will or testamentary instrument) that shall come into operation after the passing of this act, shall be apportioned so and in such manner, that, on the death of any person interested in any such rents, annuities, pensions, dividends, moduses, *compo- [*183] sitions, or other payments, as aforesaid, or in the estate,

1844.—Browne v. Amyot.

fund, office, or benefice from or in respect of which the same shall be issued or derived, or on the determination, *by any other* means whatsoever of the interest of any such person, he or she, and his or her executors, administrators or assigns, shall be entitled to a proportion of such rents" and other payments. The sole question then, is, whether the death of the person interested in the rent or other payment—the event on which the apportionment is to take place—must not be understood as a death occasioning the determination of the interest,—whether that is not the necessary effect of the immediate context "determination by any other means." I am of opinion that it must be so understood. I notice, indeed, that, in the succeeding part of the section, after enacting that the executor "shall be entitled to a proportion of such rents," and other payments, "according to the time which shall have elapsed from the commencement or last period of payment thereof respectively, (as the case may be,) including the day of the death of such person, or of the determination of his or her interest,"—the word "other" does not occur; but I think that part of the section must receive its construction from what precedes it. And upon that preceding part my opinion is clear, both on the words of the act, and the reason of the thing, which was well explained in Mr. Rolt's argument.

It was objected to this construction of the act, that one consequence would be, that, where a tenant in fee-simple devised to one as tenant for life, the devise for life would take the entire periodical rent due at the first day of payment after the commencement of his estate, and his proportionable share up to the day of the determination of his life interest. The law would operate in

his favor both at the beginning and the end of his life
[*184] estate. *This, no doubt, may be the effect of the com-

bined operation of the act and the pre-existing law; and although it is an anomaly, I think it is not an argument of any great force, upon the construction of the act, which does not affect to control the power of the tenant in fee to dispose of his estate, as between his devisees, or real and personal representatives, as he may think proper.

Demurrer allowed.

1844.—Coleman v. Rackham.

COLEMAN v. RACKHAM.

1844: March 29.

- Verification of the copy of the bill served under the 24th Order of August, 1841.
- It is not sufficient that the copy of the bill served under the 24th Order has been examined with the office copy ; unless the office copy be proved to have been examined with the engrossment.

IN this case, (which is reported 2 Hare, p. 354,) under the Order XXIV. of August, 1841, a memorandum of service of a copy of the bill examined with the *office copy* was entered.

THE VICE-CHANCELLOR, this day, adverting to the case, said, that the point had been considered by the other Judges of the court, and they were of opinion that the examination with the office copy ought not to satisfy the court, unless the office copy were proved to have been examined with the bill. The copy of the bill served under the Orders XXIII. and XXIV. of August, 1841, ought to be examined either with the engrossment, or with some other document, proved to have been previously examined with the engrossment : (a) he should not, therefore, in this respect, follow the case of *Coleman v. Rackham* in future.

(a) In the first cases in which these orders were brought into operation, it was insisted by the officers of the court that no other than *office copies* would suffice ; (see *Blew v. Martin*, 1 Hare, 150) ; but it would seem, from the above intimation, that an *office copy* (not being an *examined copy*) does not satisfy the terms of the Order.

1843.—Kearsley v. Woodcock.

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*KEARSLEY v. WOODCOCK.

1843; 19th July.

Bequest of a share in certain trust funds, in trust for A., his executors, administrators, and assigns. provided that, if A. should, during the life of B. or C., assign, charge or otherwise dispose of his share in the principal or interest thereof, or attempt or agree so to do, or do any act, whereby his share in the said moneys, if payable to himself or his executors, or administrators, would become vested in some other person, then, and in such case, all his estate, right, title, and interest in such trust moneys should be absolutely cease and determine, and thereby and thereupon become absolutely forfeited; and the trustees should thenceforward stand possessed of the shares or share so forfeited, in trust to pay, apply, and dispose of the annual produce thereof, during the lives of B. and C., for the support and maintenance of A., and of his wife and family, or otherwise for his and their benefit, in such a manner as the trustees should think proper, and after the death of B. and C. should settle and assure, or pay and apply, and dispose of the share so forfeited, in trust for, or for the benefit of A. and his family, in such a manner as they should in their discretion think proper. A. assigned all his property to trustees for his creditors, and thereby committed an act of bankruptcy, and, a fiat being issued against him, he was declared a bankrupt:—*Held*, that, upon the execution by A. of the assignment, his share and interest in the trust moneys became subject to the trust declared by the will for the benefit of A. and his wife and family; that A. was not of necessity entitled to any part of the income of the trust moneys separately from his wife and children; but that any interest of A. in the trust moneys not applicable for the support and maintenance of his wife and children passed to his assignees on his bankruptcy.

JOHN HODSON, by his will, dated in February, 1828, among other things directed his executors and trustees to stand possessed of the sum of 12,000*l.* upon trust, out of the interest thereof to pay 150*l.* each to his nieces, Margaret and Frances Kearsley; and, upon further trust, during the life of Margaret and Frances Kearsley, or either of them to pay such of the interest and annual produce of the said sum of 12,000*l.* as was not thereinbefore directed to be paid to Margaret and Frances Kearsley, respectively unto his nephews, James and Thomas Kearsley, their respective executors, administrators, and assigns, in equal shares; and from and after the decease of the survivor of them the said Margaret and Frances Kearsley to stand possessed of 8000*l.*, part of the said sum of 12,000*l.*, and the securities upon which the same should be invested, and the interest and annual produce thereof, in trust for the said James Kearsley.

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and Thomas Kearsley respectively, their respective executors, administrators, and assigns, in equal shares and proportions, as tenants in common. Provided always, and he thereby declared, that if the said James Kearsley and Thomas Kearsley, or either of them, during the life of either of them the said Margaret and Frances Kearsley, should assign, charge, or otherwise dispose of their or *his shares or share of and in the in- [*186] terest and annual produce of the said sum of 12,000*l.*, or his or their shares or share of and in the said principal sum of 12,000*l.*, or the securities on which the same should be invested, or attempt or agree so to do, or do any act whereby their or either of their shares or share of and in the said interest, moneys, and premises, if payable to themselves or himself, their or his executors or administrators, would become vested in some other person or persons, then and in such case, and immediately thereupon, the testator directed that all the estate, right, title, and interest of such of them the said James Kearsley and Thomas Kearsley, his executors or administrators, so assigning or disposing of, or agreeing to assign and dispose of, his share in the said interest, moneys, and premises, or doing any other act whereby the same would, if this proviso were not contained in that his will, vest in or become payable to any other person or persons as aforesaid, should absolutely cease and determine, and the same should thereby and thereupon become absolutely forfeited, and the trusts thereinbefore declared of and concerning his share which should not then have been carried into effect, should cease and determine. And the said executors and trustees, and the survivor of them, and the executors, administrators, and assigns of such survivor, should thenceforth stand be possessed of and interested in the share or shares, which should be so forfeited as aforesaid of the said sum of 12,000*l.*, and the securities upon which the same should be invested, and the interest and annual produce thereof, in trust, to pay, apply, and dispose of the interest and annual produce thereof, during the life of either of them, the said Margaret and Frances Kearsley, for and towards the support and maintenance of such of them the said James Kearsley and Thomas Kearsley, as would otherwise have been entitled to receive the same, and of his wife and family, or otherwise

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[*187] for his or their *benefit, in such a manner as the said trustees or trustee should think proper; and from and after the decease of the survivor of them, the said Margaret and Frances Kearsley, in trust that they the said trustees or trustee should settle and assure, or pay and apply and dispose of, the share or shares which shall be so forfeited of and in the said principal sum of 12,000*l.*, and the securities on which the same should be invested, and the interest and annual produce thereof, to or in trust for or for the benefit of the person, or respective persons, whose share or shares should have been so forfeited, and his family, or their respective families, in such manner as the said trustees or trustee, should, in their or his discretion, think proper.

The testator died in 1828. His estate was administered by his executors, and 12,000*l.* invested, and part of the dividends applied in payment of the annuities, to Margaret and Frances, and the surplus was paid to James and Thomas. On the 9th of March, 1842, Thomas executed a conveyance and assignment of all his real and personal property to trustees for his creditors, and thereby committed an act of bankruptcy; upon which a fiat issued, on the 12th of March, and he was declared a bankrupt.

The wife and children of Thomas Kearsley instituted this suit against his assignees in the bankruptcy, the trustees under the will, and the bankrupt, praying a declaration, that from and after the 9th March, 1842, when Thomas Kearsley executed the said conveyance and assignment, his estate and interest under the will became absolutely forfeited, and that the trusts concerning the same for his benefit ceased and determined, and thereupon the plaintiffs became entitled to have a moiety of the surplus [*188] interest of the 12,000*l.* applied *for their maintenance and support, or otherwise for their benefit under the trusts of the will, until the decease of the survivor of Margaret and Frances; and that from and after the decease of such survivor, the trustees and the survivor of them, his executors, &c., should stand possessed of 4000*l.*, part of the 12,000*l.*, and the interest and annual produce thereof, upon trust to settle, assure, or pay and apply and dispose of the same, for or for the benefit of the plaintiffs,

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in such a manner as the said trustee or trustees should, in their or his discretion, think proper ; and that, if necessary, the 4000*l.* might be secured for the benefit of the plaintiffs, under the trusts of the will, and the produce thereof applied, from time to time, for their benefit, as the court should direct.

The defendants, the assignees, by their answers submitted whether the direction in the will was not ineffectual to defeat or divest the right of Thomas Kearsley ; or if it was to any extent effectual, whether they, as his assignees, were entitled to so much of the surplus interest, and of the 4000*l.*, as would have been payable or applicable for the maintenance or support of Thomas Kearsley himself.

Thomas Kearsley the bankrupt, was served with a copy of the bill, and did not appear.

Mr. *Romilly* and Mr. *Palmer*, for the plaintiffs, submitted that the interest of Thomas Kearsley under the will ceased upon his execution of the assignment of the 9th of March, 1842. *Dommett v. Bedford*,^(a) *Cooper v. Wyatt*,^(b) *Lewes v. Lewes*,^(c) *Twopeny v. Peyton*,^(d) **Godden v. Crow-* [*189]
hurst,^(e) *Brandon v. Aston*,^(f) *Rippon v. Norton*,^(g)
Page v. Way.^(h)

Mr. *James Parker*, for the assignees.

The assignment of the 9th of March did not affect the interest of Thomas Kearsley, for that instrument, being an act of bankruptcy, was void. *Doe d. Lloyd v. Powell*.^(e) The bankruptcy had the effect of creating a compulsory, and was not a voluntary, alienation. *Lear v. Leggett*,^(f) *Whitfield v. Prickett*.^(g) Even should the clause of forfeiture take effect in this case, either on the execution of the void assignment, or on the subsequent bankruptcy, the trustees were still bound to employ the trust funds in some measure for the benefit of the bankrupt, and whatever individual benefit the bankrupt would retain passed to

(a) 6 T. R. 684 ; 3 Vea. 149.

(b) 5 Madd. 482.

(c) 6 Sim 304.

(d) 10 Sim. 487.

(e) 10 Sim. 642.

(f) 2 Y. & C. C. C. 24.

(g) 2 Beav. 63.

(h) 3 Beav. 20.

(i) 5 B. & C. 308.

(k) 2 Sim. 479 ; S. C. 1 R. & Myl. 690.

(l) 2 Keen, 608.

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his assignees. He cited also *Snowdon v. Dales*,^(a) *Green v. Spicer*,^(b) *Piercy v. Roberts*,^(c) *Lord v. Bunn*.^(d)

The VICE-CHANCELLOR, adverting to the case of *Wetherell v. Wilson*,^(e) said, that it was not of necessity that any part of the trust funds, under such a gift as the present, must be applicable for the separate benefit of the husband or father who had become bankrupt. The whole property might not be more than sufficient for the support and maintenance of the wife and children; and the benefit which the bankrupt derived from the property might not be capable of severance,—it might be [*190] *of such a kind, that no definite portion of the principal or income could in respect thereof be diverted from its application for the benefit of the other members of the family,—supposing, for example, the joint occupation of a house, which was necessary for the habitation of the wife and children, the expense of which was not increased by the circumstance that it was also the abode of the bankrupt. The decree in this case should be similar to that which was made by Lord Langdale in *Page v. Way*.

DECLARE, that the defendants, N. E., J. S., and J. H. S., the assignees of the defendant Thomas Kearsley, are entitled to the income accrued due before the 9th of March, 1842, the date of the creditor's deed in &c., and not paid to the defendant Thomas Kearsley, previous to his bankruptcy, on one moiety of the residue of the sum of 12,000*l.* in &c., after providing for the annual payments of 150*l.*, and 150*l.* in &c.; and let the defendants (the trustees) pay the same (if any) to the defendant J. H. S. (official assignee) accordingly; and declare, that from the date of the said deed of the 9th of March, 1842, the said income was subject to the trusts of the will of the testator, John Hodson, in &c. declared in the event of the forfeiture therein mentioned, and that, according to the true construction of the said will, the defendant Thomas Kearsley, the husband, is not entitled to any part of the said income separately from the plaintiffs, his wife and children. And that any interest of the said defendant Thomas Kearsley, under the trusts of the said will, not required for the support and maintenance of the plaintiffs, his wife and children, goes to the defendants, N. E., J. S., and J. H. S., assignees &c. Refer it to the Master in rotation, to inquire whether the present annual income of one moiety of the residue of the said 12,000*l.*, after providing for the said 150*l.* and 150*l.* as aforesaid, is more than sufficient for the main-

(a) 6 Sim. 524.

(b) 1 R. & Myl. 395.

(c) 1 Myl. & K. 4.

(d) 2 Y. & C. C. 98.

(e) 1 Keen, 80.

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tenance and support of the plaintiffs, the wife and children of the defendant Thomas Kearsley, and if so, by how much. Tax the costs of all parties of this suit,—the costs of the plaintiffs and the defendants, the trustees, as between solicitor and client, and let the same be paid and retained by the said defendants, the trustees, out of the income of the said moiety of the 12,000*l.*, after providing for the said 150*l.* and 150*l.* as aforesaid, accrued due since the 9th of March, 1842. Reserve further directions and the subsequent costs. Liberty to apply.

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1843: 22nd, 26th, and 27th July.

Bequest of stock to the “Society for Bettering the Condition of the Poor,” upon trust to apply the income in the payment of house-rent of seven or more country laborers in the principality of Wales, selected in a certain manner; and bequest of other stock to the “Society for the Encouragement of Female Servants,” upon trust to distribute the income annually in gratuities to servants in the same principality, selected in a certain manner. The two societies renounced the respective trusts, and disclaimed the legacies:—*Held*, that the discretion of the trustees was not, in these cases, of the essence of the trust; that the trust being originally created for certain definite objects, and not a gift to charity generally or indefinitely, it was not a case in which the disposition of the fund required the authority of the sign manual; and that the court would carry the trust into effect by means of a scheme.[1]

Decree for taking accounts contingent upon a preliminary finding as to the nature of the estate.

THOMAS MEYRICK, by his will, dated in 1839, after giving several sums of money to charitable societies, to be paid exclusively out of such part of his personal estate as he could lawfully charge with the payment of legacies to charitable uses, and directing them to be applied solely within the principality of Wales, proceeded to make bequests in the following words:—“In like manner, and with the like limitation, I give 1000*l.* in the new 3*l.* 10*s.* per cent. Annuities, to the ‘Society for Bettering the Condition of the Poor,’ held in London or elsewhere, for which the receipt of the treasurers for the time being shall be

[1] Legacies directed to be paid without a scheme. See *Walsh v. Gladstone*, 1 Phil. 290; as to settling scheme, see *The Attorney-General v. Ironmonger Co.*, Cr. & Ph. 208. In matter of *King’s Grammar School*, 1 Phil. 564; *Attorney-General v. Brandreth*, 1 Y. & C. 200; *Attorney-General v. Cullum*, 1 Y. & C. 411.

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a good discharge in trust to pay the dividends, amounting to 35*l.*, payable on January 5th and July 5th, for house rent, in sums not above 5*l.* each, to seven or more country laborers once only, on producing a certificate from the clergyman or churchwardens of their honesty, sobriety, quietness, and industry, and attendance at church, and their not possessing money, or land, or goods, to above 5*l.*, nor receiving parochial relief." And the testator, by his said will, after exhorting servants to be obedient unto their own masters, and to please them well in all things, not answering again, and not purloining, but having all good fidelity and denying ungodliness and worldly lusts, and to live soberly, godly, and righteously, proceeded as follows:—"For such servants, and the like limitation to the principality of Wales, which contains 42,274 female servants, I give 1000*l.* in the said

new 3*l.* 10*s.* per cent. Annuities to the 'Society for the Encouragement of Female Servants,' held at 110, *Hatton

Garden, or elsewhere, in trust to pay the yearly dividends, 35*l.*, in sums of 1*l.* to each such female servant, once only, on their producing a certificate, to be entered on the books of the society, signed by the minister and churchwardens of their parish, of their regular attendance at church, and by their masters or mistresses of their ten years' quiet and faithful service, at 5*l.* or less per annum, and of their never having been married or pregnant." "Also I give in like manner to the said society, the further sum of 100*l.* in the said new 3*l.* 10*s.* per cent. annuities, in trust to pay the dividends 3*l.* 10*s.* on July 5th, annually, to the churchwardens of the parish of Holsworthy, in the county of Devon, who shall on the Monday following openly give 2*l.* 10*s.* of that sum to the young single woman resident in that parish, being under thirty years of age, and generally esteemed by the young as the most deserving, and the most handsome, and most noted for her quietness, and attendance at church; and on the next day shall openly give the remainder of that sum to any spinster not under sixty years of age, and noted for the like virtues, and not receiving parochial relief. These donations shall be made to the same woman, being single, once only, and at noon, and their names and ages, and abodes, and the sums given to each not receiving parochial relief, and the dates, shall be

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duly entered in a book to be kept safely by every successive churchwarden, who shall sign and determine each payment under this title, 'Donations made to maintain peace on earth, and good-will amongst men.'"

The testator gave the residue of his personal estate to the Society for Promoting Christian Knowledge, to be paid to the treasurers for the time being, whose receipt was to be a good discharge for the same, in trust to pay the income yearly to such preacher, appointed and licensed by the bishops, as therein-mentioned.

*After the death of the testator, the Society for Better- [*193] ing the Condition of the Poor, and the Society for the Encouragement of Female Servants, declined the trusts of the said legacies, as not being within the purposes for which they were constituted. The bill was filed by the executor against the treasurers of the two societies which so renounced their legacies,—the treasurers of the Society for Promoting Christian Knowledge, and the Attorney-General,—for the administration of the estate under the direction of the court; and, if necessary, for a reference to the Master to approve of one or more scheme or schemes for the management and distribution of the charitable legacies. The treasurers of the two first-named societies disclaimed by their answers the legacies given to those societies, and the bill was dismissed against them.

On the hearing of the cause, it was referred to the Master to inquire and state whether the personal estate of the testator was pure personal estate, or whether the same or any and what part thereof consisted of personal estate savoring of realty, and, if any part of such personal estate consisted of personal estate savoring of realty, then it was ordered, that the Master should inquire and state who were the next of kin of the testator living at the time of his death, and if any of such next of kin had since died, who were his, her, or their personal representative or personal representatives. And if the Master should find, that the said personal estate was pure personal estate, then it was referred to the Master to take the usual accounts of the personal estate of the testator, and his debts and legacies.(a)

(a) See contingent decrees for account, *Hughes v. Eades*, 1 Hare, 489, on proof of
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[*194] *The Master, by his report, found that the testator was not possessed of any personal estate which savored of realty; and he stated the accounts of the estate, and the said disclaimers by the said two societies of the legacies bequeathed to them. On further directions,

Mr. *Wray*, for the Attorney-General, submitted that the distribution of the disclaimed legacies for charitable purposes should be according to her Majesty's appointment, by sign manual. He cited the case of *Deneyr v. Druce*,^(a) in which legacies
 [*195] having been declined by *the bodies to which they were given, were disposed of by the royal warrant.

parties being out of the jurisdiction, and on proof of plaintiff's debt. *Fisk v. Norton*, 2 Hare, 382, on finding that all parties are before the court.

(a) *Deneyr v. Druce*, 1st July, 1829, M. R. Decree to transfer and pay legacies of stock to such person or persons as his majesty, by warrant under his majesty's sign manual, should appoint to be disposed of in charity:—There were in this case two bequests, one to the governors of Christ's Hospital, on trust to dispose of the dividends of a large sum of stock for charitable purposes. The governors declined the trust:—Granted to the same purposes to which the dividends were directed to be applied by the said governors.

The other bequest was of 2000*l.* stock to the University of Oxford,—the dividends to be applied in prizes for Divinity subjects, on certain conditions. The University declined the bequest on the terms of the will:—Granted to the University for similar purposes, on other terms. See Tamlyn, 32.

Mr. *Wray* also referred to the following cases.

Da Costa v. Da Paz, 18th May, 1754. To be applied in some other charitable use, as his majesty should think fit to direct.

Bequest of 1200*l.* by Elias Da Paz, income to be applied toward establishing a *Jesuba* or assembly for daily reading the Jewish law. Warrant under sign manual, directing the Attorney-General to apply for an order of the court for paying 1000*l.* to the governors and guardians of the Foundling Hospital, to be applied by them towards supplying a preacher in their chapel, and to instruct the children under their care in the Christian religion, and for other incidental expenses attending the said chapel. See 1 Dick, 258.

Legge v. Asgill, 27th November, 1818, (V. C.) Declared, that the clear residue of the testatrix's personal estate not specifically bequeathed, ought to be disposed of in charity.

Bequest. "If there is money left unemployed, I desire it may be given in charity:"—Granted to St. George's Hospital. (See T. & R. 265, S. C.)

Ware v. Attorney-General, 19th August, 1824, M. R. Declaration, That the residue ought to be disposed of in charity as his majesty shall be pleased to direct; and

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Mr. *Tennant* and Mr. *Fane* for the executor, submitted that inasmuch as the charitable purpose was not indefinite, but a particular trust had been declared, *the court [*196] would carry it into effect, either strictly or cy pres, and that it was only in cases where the fund was to be applied generally to charity, without an indication of the mode, that the application of the fund was cast upon the crown.

Mr. *Wetherell*, for the residuary legatees.

The cases cited were—*Moggridge v. Thackwell*(a), *Hayter v. Trego*;(b) *Paice v. Archbishop of Canterbury*;(c) *Attorney-*

decree that it be transferred and paid to such person or persons as his majesty by royal sign manual shall be pleased to appoint. Bequest of residue “to the Poor:”—Granted to the poor relations of the testatrix

Attorney-General v. Londonderry, (Hele’s Charity), 22nd November, 1825. Declaration, that in the events which had happened the right of appointing the fines reserved, and to be reserved, upon the leases of the estates comprised in &c. to charitable purposes, was in his majesty by his sign manual, and reservation of further directions as to the application of the funds until his majesty by his sign manual shall signify his pleasure with respect to the application thereof.

Sanford v. Gibbons, 20th March, 1829, M. R. Decreed, to be applied in charity in such manner as his majesty by warrant under his majesty’s sign manual should appoint. Bequest to a lunatic asylum not existing:—Granted to a poor sister-in-law of the testator, and legatee under the will.

Simon v. Barber, 22d June, 1829. Decreed to be applied in charity, in such manner as his majesty by warrant under his majesty’s sign manual shall be pleased to appoint. Legacy to treasurer, governors, or directors of Guernsey Hospital, (not existing):—Granted to town and country Hospitals of Guernsey in equal moieties. See *Tamlyn*, 14.

Thorley v. Byrne, 4th December, 1830, V. C. To be applied in such manner as his majesty by warrant under his majesty’s sign manual should be pleased to appoint. Bequest to the North American Institution, (not existing):—Granted to the Benevolent or Stranger’s Friend Society, a charity benefited under the will of the testator.

Re Dickason, 8th December, 1837, V. C. Ordered that the executors of the testator, Thomas Dickason, pay the residue of the 1000*l.* (after retaining and paying costs as directed by the order) to such persons as her majesty should by sign manual appoint, for the use of such charities, and in such proportions as her majesty should under her royal sign manual direct. Bequest to ten such charities as the testator should name, 100*l.* each: if he should not name them, then the executors to make the disposition. The executors declined to act:—Granted to charities in unequal proportions.

(a) 7 Ves. 36.

(b) 5 Russ. 113.

(c) 14 Ves. 372.

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General v. The Ironmongers' Company,(a) *Ommaney v. Butcher.*(b)

July 27th.—VICE-CHANCELLOR :—The suggestion on behalf of the Attorney-General is, that, inasmuch as the trustees appointed by the testator have refused to act, the court has no means of carrying the particular trusts into execution ; for it is said, that the societies which the testator selected as the instruments for distributing these charitable funds, were not in the situation of ordinary trustees ; that their places could not, like those of ordinary trustees be supplied by others ; that it must be assumed the testator appointed these particular societies, because he considered them, owing to the objects for which they exist, as peculiarly conversant with the facts necessary to render the exercise of their discretion in the disposal of the fund more valuable than that of any other persons, and that therefore the discretion of the trustees is of the essence of the trust : on the other hand, it is said, that the disclaimers of the trustees do not affect the trust, and that it is sufficiently defined to enable the [*197] court to execute it. *In the case of *Moggridge v.*

Thackwell,(c) the authorities on this point are considered by Lord Eldon, and noticing the point as one of great difficulty, he says, "it being established that where money is given to charity generally and indefinitely, without trustees or objects selected, the king, as *parens patriæ*, is the constitutional trustee, it is very difficult to raise a solid distinction between an original gift absolutely indefinite and without qualification, and a case in which, by matter *ex post facto*, the gift stands before the court in consequence of that accident, as if it had originally been given indefinitely, without any means for carrying it into execution prescribed.[1] All I can say upon it is, I do not know what doctrine could be laid down that would not be met by some autho-

(a) 2 Myl. & K. 576 ; S. C. 2 Beav. 313 ; Cr. & Ph. 208.

(b) T. & R. 271.

(c) 7 Vee. 36.

[1] That Courts of Equity have inherent jurisdiction in regard to charities and charitable uses, independent of any statute, see *Vidal v. Girard's executors*, 2 Howard, 127 ; *Shotwell v. Mott*, 2 Sandf. Ch. R. 46 ; *Potter v. Chapin*, 6 Paige, Ch. R. 639 See, also, note to case of *Townsend v. Carus*, post p. 257.

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rity upon this point; whether the proposition is that the crown is to dispose of it, or the Master by a scheme.”(a) After advert-
 ing to several cases, Lord Eldon continues, “In the other cases,
 where all the trustees are dead,—in others where some of them
 are dead, the discretion being wholly or partly gone, or where the
 trustees surviving would not act, or where some would and
 others would not, yet the court, in a great number, if not in all
 those instances, did, by a scheme, distribute the fund.”(b) And
 he concludes, that the run of the cases, with the exception which
 he mentions, rather import, that, where originally a trust is cre-
 ated for the distribution of a charity, and the trust is not carried
 into execution, inasmuch as it was originally a trust, and not in
 a strict sense a general and indefinite gift to charity, or to
 the poor, the court would execute it by a scheme. In this case
 the objects of the trust are pointed out by the will with great
 minuteness. I have no ground, either in the language of the
 will or the circumstances of the case, for supposing that the dis-
 cretion of the particular societies named in the will was
 of the *essence of the gifts, so that the disclaimers of [*198]
 those societies is to destroy the gifts altogether. I think
 that is not the case. And, therefore, following the view which
 Lord Eldon took of the question in the case I have mentioned,
 I think it must be referred to the Master to settle a scheme for
 the distribution of these legacies, having regard to the terms of
 the charitable bequest.(c)

This court doth order, that 1000*l.* new 3*l.* 10*s.* per cent. Annuities, part &c. and
 the sum of 50*l.* 19*s.* 5*d.*, part &c. cash, be carried over in the name, &c. to an ac-
 count to be entitled “The account of the legacy for bettering the condition of the poor.”
 And it is ordered, that 1000*l.* new 3*l.* 10*s.* per cent. Annuities, other part &c. and
 the sum of 50*l.* 19*s.* 5*d.* other part &c. cash, be carried over in the name &c. to an ac-
 count to be entitled “The account of the legacy for the encouragement of female
 servants. And it is ordered, that 100*l.* new 3*l.* 10*s.* per cent. Annuities, the residue
 &c. and the sum of 5*l.* 2*s.* other part &c. cash, be carried over in the name &c. to an
 account to be entitled “The account of the legacy to the parish of Holsworthy in the
 county of Devon.” And it is ordered, that the said sum of 5*l.* 2*s.*, and any future
 dividends to accrue due on the said 100*l.* new 3*l.* 10*s.* per cent. Annuities, be paid to

(a) 7 Ves. 83.

(b) Id. 84

(c) See Seton on Decrees, p. 133; 2 Roper on Legacies, ed. 3, p. 264 et seq.

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the plaintiff Philip Reeve, during his life, or until the further order of this court ; he undertaking to remit the same, when received, to the churchwardens for the time being of the said parish of Holsworthy, to be applied by them upon the trusts of the will of the said testator. And it is ordered, that it be referred to the Master, &c. to settle a scheme for the administration of the said legacies, of 1000*l.* and 1000*l.* new 3*l.* 10*s.* per cent. Annuities, which have been respectively disclaimed on the part of the "Society for Bettering the Condition of the Poor, and the "Society for the Encouragement of Female Servants," having regard to the will of the said testator in &c. And the said Master is to be attended by all parties interested, who are to be at liberty to lay proposals for a scheme before him. Directions as to the residue, costs &c.

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*FAULKNER v. DANIEL.

1843 : November, 6th, 10th, 15th, 16th, 17th, and 18th : December 7th.

The testator, by his will, charged his debts and legacies upon his real and personal estate, and gave such real and personal estate to trustees upon trust for his nephew for life, (to whom also he gave a legacy,) with remainder to the first and other sons of the nephew successively in tail male, with remainder to the second and every other son of the testator's brother successively, in tail male, remainder to the testator's own right heirs ; and added—"and upon this last-mentioned contingency, failing heirs male of my said brother, and of my said estate going to my right heirs more remote as aforesaid, then I do hereby charge, subject, and make liable my said estate with the payment of the sum of 5000*l.* to my niece." The testator died in 1775, leaving his brother his heir-at-law. The nephew entered into possession of the real estate, which consisted of a plantation in Jamaica, subject to a mortgage created by the testator in 1765. The brother afterwards died, leaving the nephew, his only son, and then heir-at-law of the testator : the nephew died in 1822, without issue male. The bill was filed in 1837 against the mortgagees and the devisees of the nephew to obtain payment of the niece's legacy of 5000*l.* :—*Held*,

That, on the death of the nephew without issue male, the event happened on which the niece would become entitled to the legacy of 5000*l.* ; and that it was not too remote.

That the nephew was only bound in his lifetime to keep down the interest of the debts and legacies ; and that he was entitled to keep on foot, as subsisting charges against the real estate, the principal of the debts and legacies paid off by him, and also his own legacy.

That an administrator of the nephew, to whom letters of administration had been granted limited to the purposes of the suit, was a sufficient representative of the personal estate of the nephew in the cause.

That the heir-at-law of the survivor of the trustees appointed by the testator, and the personal representative of the testator, should properly be parties to the cause ; but

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the defendants not having, by plea or answer, objected that such heir or personal representative were necessary parties, the court would, under the 40th order of August, 1841, in the circumstances of the case, make a decree saving their rights. Plaintiff, entitled to a legacy, charged on a West India estate, subject to prior debts and legacies remaining unpaid, not entitled to have a receiver appointed over the estate.

The administrator under a limited administration, granted by the proper ecclesiastical court, represents the estate of the deceased to the extent of the authority conferred by the letters of administration; but, if the administration granted be more limited than the purposes of the suit require, and it is in the power of the plaintiff to obtain a more general administration, the court may require him to do so.

Legatees whose legacies were charged on real estate, subject to prior charges, not affected by lapse of time so long as any of the prior charges subsisted.

Charges paid off by the tenant for life *prima facie* kept alive, and not merged in the inheritance.[1]

Mode of taking accounts, as against mortgagees and consignees, of the produce of a West India estate.

Semble, an examined copy of a letter of attorney, inrolled in the office of record in Jamaica, is not admissible in evidence (without more;) although an examined copy of a deed so inrolled is, by force of acts of the local legislature, admissible.

THE plaintiffs were the personal representatives of Dame Janet M'Leod, and claimed to be entitled to a legacy of 5000*l.*, bequeathed to her by the will of John M'Leod, who died in 1775.

The testator, John M'Leod, was seised in fee simple in possession of a plantation in Jamaica, called Colbecks, and was possessed of some personal estate. Colbecks was, both at the time the testator made his will and at his death, subject to a mortgage created by the testator in the year 1765. The testator, by his will, and a codicil thereto, after charging his real and personal estate with the payment of his debts and several annuities and legacies, including a legacy of 1500*l.* to his nephew John, the son of his brother Donald M'Leod, gave his real and personal estate to trustees, upon trust, in default *of issue of [*200] his own body, as therein mentioned, for his said nephew John, for life, with remainder to the first and other sons of John successively, in tail male, with remainder to the second and every

[1] As to merger of charge, see *Lord Selsey v. Lord Lake*, 1 Beavan, 146; *Hood v. Phillips*, 3 Beavan, 517. *Astley v. Milles*, 1 Sim. 298. *Burrell v. The Earl of Egremont*, 7 Beavan, 231. *Tyler v. Lake*, 4 Sim. 351; *The Earl of Clarendon v. Barham*, 1 Yo. & Coll. 688, 702.

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other son of Donald M'Leod successively in tail male, with remainder in trust for the testator's own right heirs. The testator then proceeded to bequeath the legacy in question in the cause in the following words: "And upon this last-mentioned contingency, failing heirs male of my said brother, and of my said estate going to my right heirs more remote as aforesaid, then I do hereby charge, subject, and make liable my said estate with the payment of the sum of 5000*l.* sterling, to my said niece, Janet M'Leod, over and above the sums of money hereinbefore left and bequeathed to her." The testator died in 1775, without issue, leaving his brother, Donald M'Leod, his heir-at-law.

Upon the testator's death, his nephew John, the son of Donald M'Leod, became entitled for life to the residuary real estate of the testator, including Colbecks, subject to the said mortgage, and to the payment of the debts, annuities, and legacies bequeathed by the will. Donald M'Leod died in 1786, intestate, and without other issue male than John, the tenant for life. John attained his age of twenty-one years in March, 1782, and afterwards entered into possession of Colbecks.

The mortgage of 1765, shortly after the testator's death, became vested in Thwaites and Wheelwright, and was, in 1815, assigned to the defendants Thomas and John Daniel. During a great part of the time that Thwaites and Wheelwright held the mortgage, the produce of Colbecks was consigned to them in this country, in pursuance of a contract between them and John M'Leod; and, from the time of the assignment of the mortgage to Thomas and John Daniel, the produce of *Colbecks was, in pursuance of a like contract, consigned [*201] to Thomas and John Daniel.

John M'Leod, the tenant for life, paid off a large portion of the principal of the mortgage-debt of 1765, and also paid the principal of the other debts of the testator, and several of the legacies to which the testator had subjected the estate. The plaintiffs alleged that John M'Leod, as tenant for life, claimed the right of keeping up the principal of the said mortgage, and other debts, and of the legacies, so far as the principal of such mortgage, debts, and legacies, had been paid during his own estate for life out of the annual produce and income of Colbecks,

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and to stand as a creditor for such principal sums, and also for the principal of his own legacy of 1500*l.*, as charges and incumbrances against the estate of the tenant in tail in remainder, in case he (John) should have a son, and there should be a tenant in tail to succeed to the inheritance, after the determination of his own life estate ; the plaintiffs, however, insisted, that if John had a right to keep up the charges which had been paid out of the annual rents and profits of Colbecks during his life estate, as between himself and the contingent remainder-men who might succeed to the inheritance under the limitations in the will, yet he had not a right to keep up the satisfied charges against the debts, legacies, and annuities which remained unpaid. John, by different instruments, declared his intention, for some purposes and to some extent, to keep alive the debts and legacies which he had paid, but for what purposes, or to what extent, was a question between the parties in the cause. By deeds, dated in the year 1815, the sum remaining due on the mortgage of 1765, and all securities for the same, and interest, and a private debt owing by John M'Leod, were assigned to the defendants Thomas and *John Daniel, as fully and amply, [*202] and in such and the same manner to all intents and purposes, as Thwaites and Wheelwright then held the same, and by the same deed Colbecks was conveyed to Thomas and John Daniel, subject to redemption, and to the other trusts affecting the same. By another deed of the same date, in consideration of the advances made by Thomas and John Daniel, and of their continuing to provide supplies for the use of the plantation, John M'Leod conveyed his reversionary interest in Colbecks to Thomas and John Daniel, by way of security for the monies advanced and to be advanced by them ; and by the same deed, for further and better securing the said principal monies and interest, John M'Leod assigned to Thomas and John Daniel his legacy of 1500*l.*, and also all and singular other such and so many of the several legacies and other charges, liens, and incumbrances whatsoever as had been paid off with the monies of the said John M'Leod, and for which he would or might be a creditor upon the premises in the event of his death leaving issue male.

John M'Leod, the tenant for life, died on the 15th of Decem-

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ber, 1822, without issue male, leaving his daughters and co-heiresses, co-heiresses of the original testator. John M'Leod, the tenant for life, claiming, as heir-at-law of the testator, to be entitled to the Colbecks estate under the limitations in the original will to the right heirs of the testator, by his will devised Colbecks to his widow Jane for life, with remainder to his daughters successively for life, with remainder to their first and other sons in tail, subject to the mortgage of 1765, and the other charges thereon.

The plaintiffs filed their bill in March, 1837, against [*203] "the mortgagees Thomas and John Daniel, and the other parties interested in the Colbecks plantation, for an account of such part of the debt due to the mortgagees, as should be deemed to have priority over the plaintiffs' legacy,—for an account of the receipts of produce by the mortgagees, and application of the balance according to the trusts of the will of the testator; the plaintiffs by their bill offering to redeem the estate, and pay the defendants, Thomas and John Daniel, so much of their debt as should be a charge thereon prior to the legacy of 5,000*l.* to Janet.

The bill alleged, that the personal estate of the testator was very inconsiderable, and so far as it would go, had been applied in payment of debts and legacies; and it also alleged that the last survivor of the trustees under the will died in Jamaica in 1815, without heirs; or if he left any heir, he was out of the jurisdiction.

The plaintiffs made three points: first, that the event upon which the legacy of 5000*l.* was given to Janet arose in 1822, upon the death of John, the tenant for life, without issue male; secondly, that in the circumstances of the case, the charges paid by John M'Leod the tenant for life, became merged in the inheritance; and thirdly, that, in taking the mortgage account against Thomas and John Daniel, they must be treated as mortgagees in possession, and that the court must disallow the commission and charges, which, as mere consignees, they might have claimed. Upon every one of these points some of the defendants took issue.

The plaintiffs, after the answers were in, moved for a receiver,

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and for payment into court of the *slave compensation- [*204]
money, but the motion was refused.(a)

(a) The following note of the judgment of Lord Cottenham, on the motion, has been obtained :—

November 10th, 1840.

LORD CHANCELLOR.—Assuming, as the bill does, that the 5000*l.* became payable on the death of John M'Leod, the tenant for life, without issue male, and that the plaintiffs are entitled to it,—the question is, whether they are, in respect of such right, entitled to have a receiver over the Colbeck Estate, and the compensation for the slaves paid into court,—which cannot be the case if the parties in possession are entitled, for themselves or others, to the mortgage of 1765, or to such part of it, if any, as remains unpaid, or to any charges on the estate prior to the plaintiffs.* This the plaintiffs do not dispute ; but, to meet this objection, they contend that the mortgage and other charges are, as against their claims, to be considered as satisfied, and, for this purpose, they first allege that all the rents of the estate ought to have been applied in discharging the mortgage and other charges, and that, if they had been so applied, the mortgage and charges would have been paid. The bill then alleges, that John M'Leod, the tenant for life, had, out of the income of the estate, paid, or directed to be paid, part of the mortgage and of the charges, and had taken assignments of some of such charges, to preserve a claim on the estate in the event of his having issue male,—and contends, that, as against the plaintiffs' demand, he was not entitled to keep alive those charges on the estate, and goes on to admit, or, at least, not to dispute, that, at the death of John M'Leod, in 1822, about £4000 of the mortgage remained unpaid. Now, if the plaintiffs' equity, as asserted against John M'Leod, were well founded, and if he could not, from the nature of his interest in the estate, keep alive, as against the estate, the charges which were made in his lifetime, how can the plaintiffs, on that or any principle, make out that this £4000, due at his death, has been discharged? They say, by their bill, that the mortgagees, who were in possession, received sufficient to discharge it ; supposing that to be so, and that the income of the tenants for life was applied in discharging what remained due on the mortgage, such tenants for life were clearly not bound to do more than keep down the interest on the mortgage debt, and are consequently entitled, as against the estate, to stand in the place of the mortgagees for so much of the rents and profits as have been applied in reduction of the principal.

During the whole of this time, the parties in possession were not only entitled to what remained due of the mortgage of 1765, but were entitled to other charges created by John M'Leod ; and the bill complains, that they applied the rents and profits to keep down the interest on those charges, instead of discharging the principal of the old mortgage. But this was the proper course as between the tenant for life and the owners of the inheritance, and, if so, the plaintiffs have failed, in their own way of stating the case, in showing that the mortgage and charges prior to theirs had been discharged. This is a sufficient answer to the application for a receiver. I, there-

*See *Barkley v. Lord Reay*, 2 Haro, 308.

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[*205] *Administration of the personal estate of John M'Leod, the tenant for life, was granted in 1838 to T. Dear, by the Prerogative Court,—the same being limited for the purpose only to attend, supply, substantiate, and confirm the proceedings in this or any other suit. T. Dear was brought before the court by supplemental bill.

At the hearing,—Mr. *Teed*, Mr. *Temple*, and Mr. *Dickinson*, for several defendants, objected that there was no sufficient representative of the personal estate of John M'Leod, the tenant for life, before the court; that the trustees appointed by the will of the original testator being dead, the heir-at-law of the survivor ought to be made a party to the suit; and that a personal representative of the original testator ought also to be a party.

[*206] *Mr. *Tinney* and Mr. *Rennalls*, for the plaintiffs.

VICE-CHANCELLOR :—The suit is said to be defective in respect of three different parties. I shall consider, first, the objection that the personal estate of John M'Leod, the tenant for life, is not adequately represented by an administration limited to substantiate the proceedings in this suit, which is the only representation of John's estate before the court.

fore, avoid discussing the equity asserted against John M'Leod, because it may unnecessarily anticipate points which the plaintiffs may be desirous of raising at the hearing; I may, however, observe, that the plaintiffs are seeking to have the point decided against the personal estate of John M'Leod, without having any personal representative before the court.

Being of opinion that the plaintiffs have failed in showing on the pleadings that there is not vested in the defendants a title to charges on the estate prior to their claim, and exceeding in amount the compensation-money standing in the name of the Accountant-General, I am of opinion, that no case is made for transferring into the cause the amount of such compensation-money now standing in the name of the Accountant-General, and awaiting the award of the commissioners.

I have thought it more satisfactory to the rest my decisions on the case as made by the plaintiffs, and have, therefore, not adverted to the case made by the answer, but which would, if necessary to be resorted to, have furnished other answers to this application.

Motion refused, with costs.

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The testator charged his real and personal estate with the payment of his debts and legacies, and subject thereto, after a further condition not necessary to be mentioned, he gave the estate to John M'Leod, his nephew, as tenant for life, with remainders in strict settlement, and failing the prior limitations created by the will, the estate was limited to the right heirs of the testator,—a legacy of 5000*l.* being given, in that event, to Janet M'Leod, under whom the plaintiffs claim.

It appears that the property which passed by the will was subject to a mortgage created in 1765,—and that John, the nephew, having become entitled to the rents and profits for his life, subject to debts and legacies, paid, in his lifetime, all the interest on the debts and legacies, and also reduced the amount of the mortgage debt. The bill charges that the tenant for life was bound, as between himself and the plaintiffs, to have done more than keep down the interest on the mortgage and other charges.[1] Now it is, I think, impossible to maintain that proposition; and, therefore, I look at this question of parties on the assumption that the tenant for life was not bound, as between himself and the plaintiffs, *to do more than [*207] keep down the interest. And this, in point of fact, he has done, and has also applied part of the rents and profits in gradually reducing the amount of the mortgage debt. The tenant for life, it appears, has also paid off many of the legatees, and taken assignments of their legacies, and the legacies so paid by and assigned to him he has assigned to his mortgagees, the Daniels, in trust to secure other moneys due to them. The claim of the defendants, the Daniels, as assignees of the legacies, and of the mortgage debt, whether paid off by John, the tenant for life, or remaining due at his death, all precede the plaintiffs' claim, as the representatives of Janet. The bill being filed to enforce payment of the legacy to Janet, the first charge to be satisfied is the old mortgage, and next the legacies given by the

[1] As to duty of tenant for life to keep down taxes and assessments, see *Cairns v. Chabert*, 3 Edw. Ch. R. 312. For the principles on which equity assumes that a tenant for life, who is also the owner of a charge on the inheritance, has duly discharged his duty of keeping down the interest on the charge, see *Burrell v. Egremont*, 7 Beavan, 206.

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will prior to the ultimate limitation of the fee, including those which John, the tenant for life, has paid.

Now, this being the state of things, the bill does not pray any relief against John's estate. In no possible view of the case can John's estate ever become accountable to the plaintiffs, in this suit; but, in taking the accounts, John's estate may have something to receive, and that appears to me to be the only way in which John's personal representative is a necessary party to the record. John's representative is to be brought before the court, not because the plaintiffs seek to charge John's estate, but because John's estate may have an interest in the accounts to be taken in the cause.

The state of the authorities makes it proper that I should express myself with great caution on the point I am now considering. In principle, I think it is clear that where a limited administration is granted by the proper Ecclesiastical Court, [*208] and the limited administrator "is made a party to a cause, the estate of the deceased is perfectly represented for all purposes, to the extent of the authority conferred by the letters of administration. A court of exclusive jurisdiction has power to grant letters of administration, and to whatever extent that court grants administration, to that extent the estate will be represented in any suit to which the administrator is a party. It is not inconsistent with this to say, that, if the administration granted be more limited than the purposes of the suit require, and it is in the power of the plaintiff to obtain a general or more extensive representation, the court may require the plaintiff to do the utmost he can to make the suit perfect by obtaining a representation commensurate with the object of the suit, or as nearly so as the practice of the Ecclesiastical Court will enable him; but if the plaintiff has obtained an administration as extensive as the practice of the Ecclesiastical Court will give him, I cannot without the clearest authority admit that the suit is not properly constituted, especially in a case in which the parties who take the objection might themselves obtain a more general representation. The passage in Lord Redesdale's Trea-

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tise, (a) the case of *Brant v. King*, (b) the opinion of Sir Herbert Jenner in *Cawthorn v. Chalie*, (c) and the cases in the Ecclesiastical Reports,—*In the goods of the Elector of Hesse*, (d) *Harris v. Milburn*, (e) and *Woolley v. Gordon*, (f) appear to me to be authorities in accordance with the principle I have stated: and there is nothing in the cases of *Moore v. Choat*, (g) and *Clough v. Dixon*, (h) inconsistent with that principle. *The case [*209] of *Young v. Elworthy*, (i) and the cases of *Metcalfe v. Metcalfe*, (k) and *Harris v. Milburn*, show in what way the court may guard against injustice or inconvenience, if in the progress of the cause it should turn out, that, in point of amount only, a more extensive representation is necessary than that which the parties have obtained. But, without laying down any rule for other cases, I am quite satisfied, that in this case there is no reason why the suit should not proceed, as far as the representation to the estate of John is concerned.

The second objection is, that the heir-at-law of the survivor of the trustees is not even named as a party. The frame of the bill—the suggestion that the heir is out of the jurisdiction shows that the plaintiff's attention was directed to this objection, and I presume he would have made the heir a party if he could have done so. In point of form, he ought, I think, to have done something more than he has. The usual course is to name the absent person as a party to the record,—prove him to be out of the jurisdiction, and pray process against him in case he comes within the jurisdiction. That I take to be the present practice. In *Haddock v. Tomlinson*, (l) Sir John Leach seems to have thought it unnecessary that process should be prayed. I recollect that case was disapproved of, (m) and the general practice of the court is, I believe, as I have stated. In this case, the heir of the trustee is in no sense of the word a party to the record. In fact,

(a) Pp. 176, 177, 178, Ed. 4.

(c) 2 Sim. & St. 127.

(e) 2 Hagg. 62.

(g) 8 Sim. 508.

(i) 1 Myl. & K. 215; and see 1 Daniell's Chanc. Pract. 418 n., 419.

(k) 1 Keen, 74.

(m) See *Taylor v. Fisher*, M. R. 1835; 1 Dan. Chr. Pr. 260, n.

(b) 1 Willms. on Executors, 328.

(d) 1 Hagg. 93.

(f) 3 Phill. 315.

(h) 10 Sim. 564.

(l) 2 Sim. & St. 219.

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however, it is only a point of form that the heir is a necessary party. So far as the parties to the cause are concerned, [*210] *I have the legal estate before me; I have all the parties beneficially interested in the trust estate before me; and I have power to execute any decree I can be called upon to make in the absence of the heir of the surviving trustee. If he were brought here it would be on the ground of an interest, not in the parties to the record, but an interest in the trustee himself, as having a possible claim against the trust estate. It is right, as a general rule, to continue the representation to the trustees; for there may be a claim by the trustees against the trust estate. In this case none of the parties to the record have any interest in requiring the presence of the heir of the trustee; and if the absent heir has any claim on the estate, he may enforce it notwithstanding a decree in his absence saving his rights. The question is, whether I can make the decree saving his rights? Before I consider that point, I will notice the remaining objection,—that the personal representative of the original testator ought to be before the court,—to which objection the same question applies.

All the answers state that the defendants believe there was some personal estate of the original testator, and they believe that some part of it was applied to pay the debts and legacies. The testator died in 1775, and unquestionably the tenant for life and all the other parties have for many years considered and treated the real estate as being the only available property of the testator. Now, there are two classes of persons on the record in different positions,—there are those who claim in respect of the very bequest in the will of the original testator,—and those who claim derivatively, under the heir-at-law of the testator.

A doubt was suggested, but not argued,—whether [*211] *the heir-at-law of the testator meant the heir living at the death of the testator, or living at the time the previous limitations failed. I now consider the case upon the supposition that the heir-at-law living at the death of the testator was the party entitled, and on that supposition the tenant for life became entitled as such heir-at-law in the events which happened; and he by devise gave the estate over. Now the parties claim-

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ing under him must be considered as standing in the same situation as he would have done. None of those parties have objected that the personal representative of the testator is not a party, nor does it appear clear to me that they could have done so with effect. For, as the heir-at-law was the party to whom both real and personal estate were given, if the objection had been taken it might have been met by showing that he had dealt with the whole estate as if the personal estate was administered, and that no case was open to them in respect of that estate. The point, however, was not taken by those parties; and I only notice it with regard to the legatees under the will of the testator, including (under that description) those who take as appointees of the tenant for life under the power given by the testator;—they undoubtedly have a right to require that the personal representative of the testator should be here; for, having charges on his real estate, they have a right to say the personal estate shall be first applied to pay off the mortgage; or, at all events, that the personal representative should be here, so that they may get the benefit of the full estate to which they were entitled.

If, then, this were a case in which the events in question were of recent occurrence, there would not be a question, but that the personal representative of the testator was a necessary party. It was, however, said, that, regard being had to the manner in which the estate has *been dealt with, and the great [*212] length of time since the death of the testator, there could now be no occasion to bring him before the court. I cannot accede to that argument, for this reason,—the estate has been in substance in the hands of the mortgagees,—whether strictly mortgagees in possession or not,—and they were entitled to have both the real and personal estate applied in payment of the mortgage debt, and the legatees whose claims are subsequent to the mortgage have never yet been in a position to claim payment of their legacies against the mortgagees, and therefore I cannot hold them at all affected by the past dealings of this estate. They could never have insisted on the appropriation of any part of the estate for payment of their legacies, till the mortgagees were paid off, and they are not therefore in default. But

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I think the difficulty may, for the present, be got over in another way, not meaning thereby to preclude the parties from insisting upon this point in the course of the general argument of the case, if it should be thought right so to do. A party may stand in one of three different positions:—he may be a necessary party to a suit because other parties to the record cannot have justice done them in his absence; or he may be a necessary party as having an interest of his own, which interest the court may be able to protect, by saving his rights in the decree, or he may have an interest of his own which the court may not be able to protect, if a decree be made in his absence. (a) This view of the subject was before Lord Cottenham, when the Orders of August, 1841, were made, and he was of opinion, that, where the absent party was wanted only with a view to the interest of the parties to the record, or if he were a necessary party in respect of an interest of his own, which would not be [*213] prejudiced by a decree *in his absence, and the objection was not taken by the answer, there was no reason why the court should not exercise a discretion as to making a decree in his absence. The object was to prevent the inconvenience of allowing a defendant to put in his answer, not raising the objection for want of parties, and when the cause came to a hearing, to delay the plaintiff by then raising the objection; and it was with that view of the case, that Lord Cottenham sanctioned the 40th Order of August, 1841—enabling the court, in such a case, at the hearing, to make a decree saving the rights of an absent party. (b)

The objections for want of parties taken in the answers relate to parties who are now represented; and I do not find any objection taken throughout the answers, to the absence of the heir of the surviving trustee, or of the personal representative of the testator. I am satisfied that in this case I may, both as to the heir-at-law of the surviving trustee, and the personal representative of the original testator, properly apply the rule to which I have adverted. There can be no reason but one of form for bringing before the court the personal representative of a party

(a) See 2 Hare, 586.

(b) Order XL., 26th August, 1841.

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who died in 1775, when those who claim the estate have, during the whole time dealt with it as though the real estate only remained to be applied; and, as those who alone are interested in the objection have not raised it on the pleadings, I do not hesitate to apply the Order to this case.

The 40th Order of August, 1841, takes effect as to all suits depending at the time the Order was made: this is provided for by the last of the Orders.(a)

*On the objections for want of parties being overruled [*214] the cause was heard.

Mr. *Tinney* and Mr. *Rennalls*, for the plaintiffs.

Mr. *Teed* and Mr. *Dickinson*, for the defendants, John and Thomas Daniel.

Mr. *Burge*, Mr. *Temple*, Mr. *Willcock*, and Mr. *Webster*, for the other parties.

The points made in the cause have been already stated. On the question of the merger of the charges paid off by the tenant for life, the cases of *Jones v. Morgan*,(b) *Countess of Shrewsbury v. Earl of Shrewsbury*,(c) *St. Paul v. Viscount Dudley and Ward*,(d) *Astley v. Milles*,(e) and *Lord Selsey v. Lord Lake*,(f) were cited. On the argument with regard to the remoteness of the bequest in favor of Janet,—*Bristow v. Boothby*,(g) *Morse v. Lord Ormonde*,(h) *Case v. Drosier*,(i) and on the nature of the account to be directed against the mortgagees,—*Leith v. Irvine*.(j)

VICE-CHANCELLOR.—Upon the first point,—the plaintiffs' title to the legacy, I did not during the argument entertain, nor have I since entertained the slightest doubt. The objections *taken to the plaintiffs' claim, as far as I could understand them, were two: first, that the event had not hap- [*215]

(a) Order LL., 26th August, 1841.

(b) 1 Bro. C. C. 206, 218.

(c) 3 Bro. C. C. 120; S. C. 1 Ves. jun. 227.

(d) 15 Ves. 173.

(e) 1 Sim. 298.

(f) 1 Beav. 146.

(g) 2 S. & S. 465.

(h) 1 Russ. 382.

(i) 2 Keen, 764. See 1 Jarman on Wills, 224; Lewis on Perpetuities, 255.

(j) 1 Myl. & K. 277.

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pened upon which the legacy was payable; and secondly, that the legacy was too remote.

With respect to the former of these objections,—if the words, “and of my said estate going to my right heirs more remote as aforesaid,” were struck out of that clause in the will which describes the event upon which the plaintiffs’ legacy was to arise,—no question could occur upon that point. The will would then read thus: “And upon this last-mentioned contingency, failing heirs male of my said brother, then I hereby charge” &c. The defendants’ argument is, that the insertion of the words which I have supposed to be omitted annex a new condition to the plaintiffs’ legacy, and that it is not enough that John should have died without issue male, unless the estate should go to an heir of the testator more remote than John or his issue male, whereas it was said (for the defendants) that John himself having been the heir-at-law of the testator, entitled to his estate by force of the limitations in the will, the event contemplated by the testator had not arisen. According to this argument, it would not be enough that the estates created by the will had failed or become exhausted, and the estate vested in the testator’s right heirs,—the plaintiffs’ legacy would be contingent upon the relationship in which the person filling the character of heir stood to the testator. An intention of that kind must be very distinctly expressed, before the court would adopt such a construction. In answer to such an objection, it would perhaps be sufficient to rely upon the words, “as aforesaid,” to show that the testator meant only to describe the event upon which his estates would go to his own right heirs, failing the settlement made by his will

on the heirs male of his brother Donald; but without [*216] relying upon the words, “as aforesaid,” it is manifest, that, where the testator speaks of heirs more remote, he means more remote, in point of limitation, than those comprised in the settlement made by his will on the heirs male of his brother Donald. If (as I think the true construction of the will is) the fee in Colbecks vested at his death in his brother, the testator must have known that such would be the case. If on the other hand, the heir mentioned in the will meant the person who would be heir at the time of the failure of the issue

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male of Donald, the daughters of John, the tenant for life, would take. In either way, the estate of the heir is more remote, in point of limitation, under the will.

The second objection to the plaintiffs' title is clearly untenable. The suggestion was, that the testator's brother, Donald, might have had a son or sons other than the plaintiffs, who might have died in the testator's lifetime, leaving issue male who survived John; and that in that case the issue male of Donald would not have failed, although John died without issue male. I do not admit that the existence of such issue of Donald, as the objection supposes, would have prevented the remainder to the testator's own right heirs from taking effect. But the short answer to the objection is, that there never was such issue of Donald as the objection supposes; and as the will of the testator, for the purpose of ascertaining the persons who are to take, speaks from his death, the objection fails altogether.

The next point insisted upon by the plaintiffs is, that, in the circumstances of the case, the charges paid by John, the tenant for life, became merged in the inheritance.[1] The question is, whether the amount of the debts and legacies, having an original priority over the plaintiffs' legacy, which were paid by a tenant for life, or by *the mortgagees, at his instance [*217] or with his consent, during the life of the tenant for life; and whether, also, the legacy of 1500*l.* to John, the tenant for life, are continuing charges upon the estate in favor of the personal estate of John, or, at all events, of the Messrs. Daniel.

Upon this part of the case, it is certainly with satisfaction that I have come to that conclusion which the justice and good sense of the case manifestly require,—that, in favor of the Messrs.

[1] That a tenant for life, paying off a charge upon the estate, in the same transaction, merging the security by taking an assignment connecting it with the legal estate of inheritance, *prima facie* puts an end to the charge; but something is required to manifest an intention to exonerate the inheritance. A simple payment of the charge, without more, is sufficient to establish the right of the tenant for life to have the charge raised out of the estate. He is under no obligation or duty to make a declaration, or to do any act demonstrating his intention. The burden of proof is on those who allege that, in paying off the charge, he intended to exonerate the estate. See *Burrell v. The Earl of Egremont*, 7 Beavan, 231; *St. Paul v. Viscount Dudley and Ward*, 15 Ves. 173.

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Daniel, at all events, the amount of the legacies and other charges so paid by or at the expense of the tenant for life constitute a subsisting charge having priority over the plaintiffs' legacy; and as further directions must in this case be reserved, I do not propose, at this moment, to go beyond the title of the mortgages.

To begin with the abstract rule to which I was referred by the plaintiffs. It was admitted, and necessarily admitted, that the payments made by or at the expense of John would *prima facie* be kept alive, and not merged for the benefit of the inheritance; and, consequently, that they would subsist for the benefit of the personal estate of the tenant for life, unless some evidence of an intention on his part that they should merge for the benefit of the inheritance could be adduced. Indeed, that it was *prima facie* for the interest of the tenant for life to keep alive the charges, is manifest from the position in which he stood as a party whose estate was subject to many charges, and not to a single charge only, irrespectively of his limited interest as tenant for life: *Forbes v. Moffatt*.^(a)[1] The question,

(a) 18 Ves. 384.

[1] Although as a general rule where an equitable and legal estate are united in the same person; the former is merged in the latter: as where the owner of an equity of redemption pays off a subsisting mortgage, and takes an assignment of it, it will be intended that he does it to exonerate the estate from the incumbrance, and that the mortgage is extinguished, unless it appears that he has some beneficial interest in keeping the legal and equitable estate distinct. *Gardner v. Astor*, 3 John. Ch. R. 53. See *James v. Morey*, 2 Cowen, 246; S. C. 6 John. Ch. R. 411. Although the rule at law was deemed inflexible that where a greater and less estate met and coincided in the same person, in one and the same right, without any intermediate estate, the lesser estate was immediately annihilated: or in legal language merged in the greater. In analogy to this rule, courts of equity have held that when the legal and equitable estate unite in the same person in the same right, the equitable is merged in the legal estate. But in equity this rule is not inflexible, it is in reference to the qualification of the rule in equity, that Chancellor Kent states the rule in *Gardner v. Astor*, as the one that must prevail "*unless* it appears that the party has some beneficial interest in keeping the legal and equitable estate distinct." The modern rule in equity seem to be this, that whether there is a merger or not will depend on the express or implied intention of the person in whom the estate unites and the court will imply an intention to keep the estates separate, or to unite them, as the case may be, awarding as the general convenience and substantial justice between the parties in-

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then, as regards the Messrs. Daniel, is, whether John *did any act in his lifetime whereby to show an intention [*218] that his charge, in the events which have happened—his death without issue male—should merge instantly; the effect of which would be to give the plaintiffs, to the extent of the charge in question, a priority over the Messrs. Daniel, so far as they claim under John, the tenant for life, and thereby to increase the liabilities of John's personal estate. [His honor then went through the several instruments, and the circumstances relied upon by the plaintiffs, and concluded that nothing had been done by John whereby the charges had become merged, and that they, therefore, subsisted in favor of the mortgagees.]

The last point in the plaintiffs' case is, that, in taking the account as against the defendants, Messrs. Daniels, they are to be treated as mortgagees in possession, and, in that character, as not entitled to allowances which, if they had been regarded as consignees only, they might have claimed.

interested may require. See *Skeel v. Spraker*, 8 Paige Ch. R. 186. *Hinchman v. Emans, adm'*. Saxton's, Ch. R. 100. That is whenever the court can discover from the facts in the case that the person in whom the legal and equitable estates unite has an interest to keep the equitable estate alive either for the protection of his title or some other right that will hold that there is no merger, see 6 Conn. R. 373. *Mills-paugh v. M'Bride*, 7 Paige Ch. R. 509. *Hinchman v. Emans, admr.* 1 Saxton Ch. R. 100. In *Hinchman v. Emans, admr.* above cited, Vroom, Chancellor, said: "It is not a necessary consequence, when the legal and equitable titles unite in the same person that the equitable title becomes merged in the legal. A court of chancery will consider the mortgage subsisting when the purposes of justice require it. In that case the holder of a mortgage took a release or conveyance of the equity of redemption and it was held not to be a merger. Upon analogous principles it has been held that one who has paid money upon a mortgage of lands, to which he had a title which might have been defeated thereby, has a right to hold the land as if the mortgage subsisted, until he shall have received the money due on it from some one who is entitled to redeem. *Towle v. Hoit*, 14 N. H. R. 2 Series, vol. 2, p. 61. See *Robinson v. Leavitt*, 7 N. H. R. 73. For cases which recognize the rule that the question of merger or not depends upon equitable circumstances, see *James v. Johnson*, 6 John. Ch. R. 417. *Starr v. Ellis*, 6 John. Ch. R. 393. *Tice v. Annin*, 2 John. Ch. R. 125. *Cox v. Wheeler*, 7 Paige Ch. R. 248. *Freeman v. Paul*, 3 Greenleaf R. 260. *Thompson v. Chandler*, 7 Greenleaf R. 377. *Bassett v. Mason*, 18 Conn. R. 131. *Lockwood v. Sturdevant*, 6 Conn. R. 373. *Doton v. Russell*, 17 Conn. R. 146. *Donald v. Plumb*, 8 Conn. R. 447. *Philips v. Brydges*, 3 Ves. Jr. 126. *Forbes v. Moffat*, 18 Ves. Jr. 384.

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Upon this question, the decision in *Leith v. Irvine*(a) is binding upon this court, notwithstanding the decision in *Sayers v. Whitfield*.(b) I cannot, however, avoid feeling some difficulty upon the case of *Bunbury v. Winter*,(c) assuming that case to be (as the Lord Chancellor certainly considered it in *Leith v. Irvine*, and as it has, in fact, always been considered) a judicial determination upon the points there raised. In that case (as in the case before me,) the mortgagees contracted to provide for debts due from the mortgagor to third persons. In that case the mortgagor demised the property to the mortgagees for a [*219] term of 500 years, and the trusts of the term were declared to be, that the mortgagees should assume the management of the plantations, and appoint agents to reside upon them. The mortgagees were to be consignees of the produce of the plantations, and out of the monies arising from the sale, after paying the expenses of the plantations, were to pay a crown debt,—then to reimburse themselves all advances they might have made on behalf of the mortgagor, and to pay over the clear surplus to the mortgagor. The mortgage-deed contained covenants respecting the management of the estates, by one of which the mortgagor, in the event of his returning to the colony, might take upon himself the management; his power, however, was only to be concurrent with that of the agents or attornies of the mortgagees. By another covenant, the mortgagor was to be entitled to draw on the mortgagees to the amount of 1500*l.* per annum for the support of himself and family. And, lastly, there was a covenant by the mortgagor, that he would continue to the mortgagees the consignments from the plantations, until full discharge of the obligation they were under for him, and of all other advances to be made by the trustees. The bill, in that case, after suggesting that the mortgagees were satisfied, prayed that the mortgagor might be let into possession,—for a receiver and consignee,—and that the mortgagees might be restrained from interfering in the management. From the scope and prayer of the bill, it is impossible not to treat the case as one in which the mortgagees had been, and were, in the

(a) 1 Myl. & K. 277.

(b) 1 Knapp, 133.

(c) 1 J. & W. 255.

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management of the plantation ; and Lord Eldon, in his judgment, observes of the mortgage-deed :—" It is not a demise to be void on payment by a given day, but it is a demise obliging them to manage the estate ; they are also to take upon themselves to settle his debts in the colony ; their agents are to manage the estate ; *but at the same time it is stipu- [*220] lated, that if he (the mortgagor) chooses to take possession of it himself, they (the mortgagees) are to receive no commission, and in consideration of all this they are to have the consignments."(a) This case is considered by the Lord Chancellor, in *Leith v. Irvine*, as a direct determination that a mortgagee, in circumstances like the mortgagees in that case, may charge commission.

Now if, in the present case, the evidence proves that the Messrs. Daniel had possession of Colbecks adversely (as in *Leith v. Irvine*,) in the simple character of mortgagees in possession, I have only to follow *Leith v. Irvine* in the decree I am to make. If they have not been in possession adversely as mortgagees, or if their possession has been of a qualified character, as, by managing only by attorney jointly with the mortgagor, or even exclusively, the authority of *Bunbury v. Winter*, approved of in *Leith v. Irvine*, may leave the case in a different position. It is not, if that case be law, every interference with the management of the estate by a mortgagee which will make him, for all purposes of account, a mortgagee in possession, or oblige the court so to consider him. And the difficulty in which I may possibly find myself is increased by the grounds upon which the decision in *Leith v. Irvine* was founded. The Lord Chancellor, in that case, repudiated usury, and tendency to usury, as the ground of his decision ; and rested it exclusively upon the relation between the parties.

[His honor then proceeded to consider the bills, answers, and evidence, on the question whether the mortgagees had in fact been in possession ; and concluded, *that they [*221] raised a serious doubt whether the court might not do great injustice, by at once determining (against the mortgagees)

(a) 1 J. & W. 262.

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that their case was to be governed by *Leith v. Irvine*, and not protected by *Bunbury v. Winter*; that it might be, that Messrs. Daniels, not having been mortgagees in possession in the strict sense of the word, might nevertheless have so acted in regard to the estate, that the account against them ought to be taken as against mortgagees in possession; and, referring to *Chambers v. Goldwin*,^(a) his honor said, that, giving the defendants the opportunity which inquiry would furnish, the court was bound to provide for taking the account on correct principles, although the case for doing so might not be expressly made upon the pleadings.]

DECLARE, that, upon the death of John M'Leod, in 1822, without issue male, Janet M'Leod, or the plaintiffs, as her personal representatives, became entitled to the legacy of 5000*L.*, and direct an account of what is due in respect thereof. Declare, that payments made by John M'Leod, or by the mortgagees, in satisfaction of the principal of the debts and legacies charged upon the estate, and also the legacy to the said John M'Leod, are subsisting charges, and that the mortgagees are entitled to the benefit thereof, as security, &c. Reference to inquire who has been in possession of the mortgaged estate since April, 1815, and particularly whether the defendants have been in such possession,—with liberty to state special circumstances. Further directions and costs reserved.

The plaintiffs tendered, as evidence of the possession of the mortgagees, examined copies of certain powers of attorney executed by them, and inrolled in the office of record in Jamaica, with reference to the management of *the estate. [*222]

A witness for the plaintiffs proved the law of Jamaica on the reception of copies of inrolled instruments in evidence, but said, the law did not require letters of attorney to be recorded, unless they were made the foundation of legal proceedings.

Mr. *Teed* and Mr. *Dickinson* objected to the admissibility of the examined copies; the powers of attorney not being necessarily records, but being records only under certain circumstances, which had not in this case been proved to exist, in order to lay a ground for their reception. These documents differed, therefore, from the inrolments of record admitted in *Tulloch v. Hartley*.^(b)

(a) 9 Ves. 254.

(b) 1 Y. & C. C. C. 114.

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The VICE-CHANCELLOR intimating an opinion that the examined copies were not, under the circumstances, admissible as secondary evidence of the powers of attorney themselves, the plaintiffs read the admission of the documents, with the accompanying explanation, in the answers.

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[*223]

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The defendant, who was a customer of, and had an account with a bank, was also employed by the bank to raise money on certain Spanish bonds, which he accordingly did; the money being afterwards recalled by the mortgagees, and not paid, the bonds were sold; and the defendant received the balance, and retained it, without the knowledge of the bank. On a bill filed on behalf of the bank for payment of this balance, and also for a general account:—*Held*, that, although the defendant, by his answer, said the result of the general account when taken would be in his favor, yet he was not entitled to withhold payment of the balance received by him in respect of the bonds until the general account should be taken; and a decree for payment of that balance and interest was accordingly made, and also the decree for taking the general account.

A banking company, who were mortgagees of certain Spanish bonds, employed the defendant to raise money upon them by deposit in his own name: the party with whom the defendant deposited them called on the defendant for repayment, and, on default, sold the bonds, with the concurrence of the defendant, without the knowledge of the company, and paid the balance of the proceeds to the defendant. The company was afterwards compelled by their mortgagor to replace the bonds or their value:—*Held*, that the defendant was answerable to the company for the market price of the bonds at the time of the actual sale, and that he was not answerable for the value of the bonds at any other time.

The plaintiffs, who claimed as trustees of a dissolved banking company, and were proved to have been partners in the company, *held* entitled to sustain a suit, as representing the company, against a defendant who had been in the habit of transacting business with the company, and had dealt with the trustees in that character, and by his answer to the suit made no positive suggestion that the plaintiffs did not sufficiently represent the company.

A few of the partners, in a company consisting of more than one hundred and fifty persons, *held* entitled to sue on behalf of the whole, to recover a debt due to the company.

THE plaintiffs and other persons, upwards of one hundred and fifty in number, were partners in a joint-stock company,

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called the "British and Australasian Bank." The company was dissolved in December, 1840, and the plaintiffs, being five of the partners, were, at a general meeting of the shareholders, appointed trustees to wind up its affairs; and, in that character, they filed the present bill.

The bill stated that one Barnard, in October, 1839, deposited with the bank, by way of security for an advance which the bank had made to Barnard, eleven Spanish bonds, payable to bearer; that Boucher, the managing director of the bank, in November, 1839, placed the Spanish bonds in the hands of Pym, who undertook to procure an advance of 500*l.* upon them in his

own name, and to re-deliver them to the bank, upon re-
[*224] payment of that advance and interest; that *Pym obtained 500*l.* from Messrs. Vigne & Sons, on the security of the bonds, in his own name, and handed over to the bank the sum so obtained; that the bank paid Pym the interest from time to time, in order that he might pay the same to Vigne & Sons; and that Pym promised, if the said loan were recalled by Vigne & Sons, to repay it out of his own funds, or find another person to make the advance; that, after a short time had elapsed, Vigne & Sons required payment of the loan, and Pym led the managers of the bank to believe that he had repaid Vigne & Sons, and deposited the bonds with another party, as a security for a similar advance.

The bill stated that, in winding up the affairs of the bank, the plaintiffs found a balance due from Pym to the bank, of 1257*l.* 6*s.*, consisting of advances made to him on consignments of goods to Australia, for which Pym had given bills on the consignees; that there was also a balance of 123*l.* 8*s.* 6*d.* due from Pym, on his general account with the bank; and that there was no entry in the general account relating to the business of the Spanish bonds, which was and had always been regarded as a separate transaction: that, in March, 1841, Pym had signed a statement, acknowledging the accuracy of these balances, and the plaintiffs at the same time advanced him a further sum of 560*l.* on the security of the same consignments to Australia.

The bill stated that, in October, 1841, Pym gave the plaintiffs notice that he had been applied to for repayment of the money

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advanced on the Spanish bonds, and inclosed a note purporting to be written by one Hall, threatening to sell the bonds if the sum were not immediately repaid ; that application was made to Hall, who referred the plaintiffs to Pym, and Pym ultimately refused to part with the bonds, and said that he would *not deliver them up until all transactions between him [*225] and the bank were closed.

The bill stated that the Spanish bonds having greatly increased in value, Barnard made application for their re-delivery, upon payment of the advance which he had received ; and, in May, 1842, brought trover against the plaintiffs to recover the bonds ; and the plaintiffs, having no defence, settled the action by paying Barnard 100*l.* 3*s.* 2*d.* for his debt in respect of the bonds, and costs.

The bill prayed that the defendant might be ordered to deliver up the eleven Spanish bonds to the plaintiffs ; or if it should appear that they had been sold by, or by the direction of, the defendant, that it might be declared the defendant was bound to account for them at their highest value in the “ money market ” since such sale, or such other period as the court should direct ; and also for the damages occasioned to the plaintiffs by such sale of, or refusal to deliver up, the bonds. The bill also prayed an account of the dealings and transactions between the defendant and the bank, and that the defendant might be ordered to pay the balance which should be found due.

The defendant, by his answer, said that Messrs. Vigne & Sons having required repayment of the loan upon the bonds, the defendant informed Boucher thereof, and Boucher said that the bank could not spare the money, and authorized the defendant to sell the bonds ; and that Vigne & Sons, on the 31st of October, 1840, with the privity and concurrence of the defendant, sold the bonds, at the market price, for the sum of 716*l.*

11*s.*, which, after deducting the loan, interest *and com- [*226] mission, left a balance of 199*l.* 8*s.* 7*d.*, which Vigne & Sons then paid to the defendant.

The defendant said that he had been employed by the bank from time to time to discount, or procure to be discounted, bills of exchange in his own name, which he had done, receiving a

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commission thereon; that the transaction with regard to the Spanish bonds was of a like nature, and that he did not enter into a special agreement respecting them; that he did not know that the bank had received or held the bonds only by way of security, until he was informed thereof by Barnard, in the year 1841. The defendant said that, at the time he received the balance of 199*l.* 8*s.* 7*d.* from Vigne & Sons, the bank was indebted to him, and that they still were indebted to him in respect of the consignments, the produce of which they had received, and of his commission in the discounting business. He said that he was justified in the representations which he had made, and in refusing to disclose the real circumstances with respect to the Spanish bonds, by the conduct of the bank and the plaintiffs towards him. The conclusion of the court on the effect of the evidence will appear from the judgment. At the hearing.

Mr. *Russell* and Mr. *Anderson*, for the plaintiffs, argued that an immediate decree ought to be made against the defendant for payment of the market price of the Spanish bonds at the time the plaintiffs had applied to him for their re-delivery, or at the time that the plaintiffs had been compelled to account for them to Barnard; and that an account ought to be directed of the other transactions between the defendant and the bank.

Mr. *Kenyon Parker* and Mr. *Giffard*, for the defendant, *contended, first, that the plaintiffs did not represent the British and Australasian bank so as to be enabled alone to institute a suit on behalf of the company; and secondly, that the matter relating to the Spanish bonds was an item in the general account between the defendant and the bank, and that neither from the nature of the transaction, nor from the circumstances or consequences of the sale of the bonds, ought it to be the subject of any special direction in the decree for account which must be made.

VICE-CHANCELLOR :—The plaintiffs sue on behalf of themselves and the other partners in a dissolved partnership or com-

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pany called the "British and Australasian Bank." They assume to themselves the right to represent the partnership or company. The bill seeks to charge the defendant with the market value, at a given time, of certain Spanish bonds, and seeks also an account of the general dealings and transactions between the bank and the defendant.

Three questions have been raised in the cause ;—First, do the plaintiffs properly represent the company in this suit? Secondly, is the defendant to be charged, in respect of the bonds, otherwise than with the amount actually produced by the sale of these bonds,—being (as must be here assumed) the market value of the bonds at that time? and, Thirdly, having determined the amount of the defendant's liabilities in respect of the bonds, is he to be charged therewith at once, as upon a separate transaction, without reference to the general account?—or is the amount of the defendant's liabilities in respect of the [*228] bonds to be treated as an item in the general account prayed by the bill, and added to or set-off against the balance payable by or due to him upon the result of the account?

Upon the first point I did not during the argument entertain, nor have I since entertained, any doubt. Admitting that the plaintiffs' evidence is somewhat general, I think it sufficient, with reference to the circumstances of this case. The plaintiffs have proved the constitution and acting of the partnership,—that the plaintiffs were partners,—and that they continued so up to, and at the time when the dissolution was resolved upon in 1839–40; and that the number of the partners before and at that time exceeded 150. The consequences of the dissolution *prima facie* would be to prevent the partnership from having any future transactions on the partnership account, although that consequence does not appear to have strictly followed in the present case. But the dissolution of the partnership had no effect upon the old transactions and dependencies of the partnership prior to and at the time of the agreement for dissolution. Those who were partners at the time of the dissolution remained partners in the old transactions and dependencies, and for the purpose of winding them up: and the presumption of law, in the absence of anything to control it, is, that those who were partners at the

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time of the dissolution continued so afterwards. This general presumption, together with the consideration of the means which, according to the plaintiffs' evidence, the defendant had of knowing the actual situation of the plaintiffs,—the absence of all positive suggestion on his part, notwithstanding such means of knowledge, that the plaintiffs do not sustain the characters to which they lay claim,—and his actual dealing (for his [*229] own benefit) with, and recognition of, *the title of the plaintiffs after the dissolution, down to the time of filing the bill, is in my opinion amply sufficient to sustain the plaintiffs' case in this suit against this defendant.

The personal title of the plaintiffs being proved, the number of the partners is an answer to the defendant's observation as to the mere frame of the suit. I may observe, that if (as the defendant contended) the resolution to dissolve the partnership were not binding, the case of the plaintiffs, as to the point I am now considering, would rather be strengthened than impaired, so far as the question of the frame of the suit only is concerned.

The second point must, I think, be decided in favor of the defendant. The deposit of the bonds with Vigne & Sons, in November 1839, as a security for 500*l.* advanced by them, is a fact common to both parties; and that Vigne & Sons knew no one in the transaction except the defendant, is admitted. It is admitted also that the deposit carried with it, so far as Vigne & Sons were concerned, a right to sell the bonds in satisfaction of their debt. The bonds in fact, were sold in October, 1840, and produced,—beyond the amount due to Vigne & Sons, and the expenses of sale,—a balance of 199*l.* 8*s.* 7*d.*, which was received by the defendant and applied to his own use. If it had appeared that the defendant had redeemed the bonds out of the hands of Vigne & Sons, and afterwards converted them to his own use, I will not say that, in the very singular circumstances of this case, the plaintiffs might not possibly have been justified in treating such conversion as wrongful, and have charged the defendant with the value of the bonds at some other time than that of the sale. But it appears distinctly from Boucher's [*230] evidence that, in October, 1831, Vigne & Sons *were pressing Pym for payment of their debt,—that Pym

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communicated that fact to Boucher, and stated that Vigne & Sons were determined to sell the bonds if the money were not returned to them,—that Boucher was unable (owing to the embarrassments of the Bank) to find the money, and did not find it, but told Pym that if Vigne & Sons were determined to sell the bonds, it could not be helped. Boucher, it is true, adds, that the defendant undertook to try and get the loan continued, and afterwards told Boucher he had succeeded in doing so. But the defendant, by his answer states that the bonds never were in his possession after the deposit with Vigne & Sons; and the evidence of the witness Vigne tends to confirm the answer. Upon the evidence in the cause, the answer denying that the defendant ever undertook to redeem the bonds, or procure them to be redeemed,—I cannot but conclude that that which might have been lawful, was lawful,—that the sale of the bonds was the lawful act of Vigne & Sons; and if so, I cannot charge the defendant with more than the actual produce of the sale,—*i. e.*, the balance of 199*l.* 8*s.* 7*d.* and interest. His tortious acts commence with his retainer of that balance.

The third point presents the only question of difficulty in the cause. The circumstances which are necessary to understand and dispose of this question are few and simple. The defendant had dealings with the Bank as a customer, and borrowed money from the Bank upon the security of shipments made to Australia. His money-transactions with the Bank formed the subject of account with the Bank, and such an account was open and subsisting. Besides these matters of account, the defendant discounted, and procured others to discount, bills for the Bank, and assisted the Bank in raising money for its current business; but these were isolated transactions, perfected at once, and never entering into *any account whatever. [*231] Among these isolated transactions, that of the loan and deposit of the bonds with Vigne & Co. was one. The defendant in his answer to the original bill, after having explained the discounting business he had done for the Bank, says, that in November, 1839, Boucher, in the course of the defendant's discounting business, requested him to procure a loan of 500*l.* upon the security of the bonds, and that he did so accordingly. In

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his answer to the amended bill, he says that the account stated between himself and the plaintiffs, in March, 1841, did not contain any entry relating to the bonds or to the advances made thereon, and that such bonds and advances formed a separate transaction, and were kept apart from the general transactions of the defendant with the Bank: coupling this with the fact that, in March, 1841, after the sale of the bonds, the account between the defendant and the Bank was adjusted and settled for the purpose of showing the amount of the debt owing from the defendant to the Bank, and for which the defendant says his shipments to Australia were a security, it is impossible to suppose that a bond transaction was intended by either party to form an item in account between the defendant and the Bank. In fact, the defendant has not suggested that, according to the original transaction itself respecting the bonds, he was not bound to hand over the balance of 199*l.* 8*s.* 7*d.* to the Bank the moment he received it: he admits that he was bound to have done so, so far as the original transaction was concerned. His case is, that the conduct of the Bank, in respect of the shipments made to Australia, justified him in the course of detainer,—of concealment and misrepresentation, which he pursued, respecting the balance of 199*l.* 8*s.* 7*d.* According to his own case, the detainer of this sum was tortious, unless he can justify it by reference to that conduct of the Bank upon which he relies. His case *is, that, at the time of the sale of the bonds and his receipt of the balance, the amount of the shipments received by the agents of the Bank exceeded by nearly 1000*l.* the debt of the Bank; and that the Bank, notwithstanding this, directed their agent in Australia to carry the whole of the shipments to the credit of the Bank. I have read both the answers with attention, for the purpose of seeing whether the defendant can reasonably be understood as swearing that, in October, 1839, at the time he received the balance of 199*l.* 8*s.* 7*d.*, he then knew, or had reason to believe, that the actual receipts of the Bank, in respect of their shipments had paid the amount of their debt. Looking at the dates of the loans and shipments in February and April, 1840, it is scarcely probable that such could be the case; but I am satisfied the answer contains no such

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representation. The effect of the answer is, that, at the time of swearing the answer in November, 1842, the defendant undertakes to represent that, in October, 1839, the state of the plaintiffs' receipts was more than sufficient to pay their debt. And if that be the effect of the answer, the retainer of the 199*l.* 8*s.* 7*d.* was originally wrongful; which coupled with his concealment and misrepresentation on the subject, cannot but lead the court to look with suspicion upon every part of his case. What then is the case upon which he relies as an *ex post facto* ground for retaining the balance of 199*l.* 8*s.* 7*d.*? The direct advances by the Bank to the defendant are admitted. The security to which the Bank is entitled is admitted. It was to consist (according to the answer of the bill of lading, policy of assurance, and invoice of the merchandize shipped. These the Bank, by their agents in the colony, were to retain until their bills were paid; and they were then to resign and give up all further control over the merchandize and the proceedings.

*Now, for the purpose of the argument, I will suppose the [*233] answer to allege that the Bank has received more money in value, than the amount of the debt due from the defendant to the Bank, upon the account of March, 1841. Would that entitle the defendant, in the absence of all evidence to support the allegation in the answer, to claim that he ought not to pay the 199*l.* 8*s.* 7*d.* until the result of the account is known? Can a debtor withhold payment of a debt, which by law and in honor he ought to have paid long since, merely by *saying* his creditors' securities for another unconnected debt will be found, upon accounts being taken, to exceed the amount of that other debt? I know of no such equity. In the case of *Rawson v. Samuel*,^(a) the plaintiffs had contracted to make present advances by accepting bills upon the shipment of goods by the defendant, and in return the proceeds were to be sold by the plaintiff's agents abroad and remitted to them. After a time the plaintiffs refused to accept the defendant's bills drawn by him in respect of a particular shipment, after the ships had left this country; and they sought to justify that refusal, on the ground as they alleged, that the de-

(a) Cr. & Ph. 172.

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defendant had overdrawn the value of the goods shipped. The defendant brought his action against the plaintiffs for a breach of contract, and the plaintiffs filed their bill against the defendant for an account of the transactions between them, and payment of the balance which they alleged would be found to be due from the defendant, and they moved that execution in the action might be restrained. Lord Cottenham—after observing that the case was not, in truth, a case of set-off, for there was not, until the account should have been taken, any liquidated balance—said that that the damages which might be assessed [*234] ed by the jury would be assessed as a present *compensation for the injury complained of, and there was no equity upon which this court should substitute, for that present compensation, a future remission of debt upon an account to be taken; and he laid down, with great clearness, that the mere pendency of the account in respect of transactions not affecting the amount of damages, would not sustain the injunction.(a)

It is, however, I believe, unnecessary to go into that argument, for I doubt whether the several parts of the answer can be taken to say more than that, in money and goods together, an amount exceeding the debt in value has been received,—not that the plaintiffs have received enough in cash to pay their debt.

It would be quite a new proposition to say that the plaintiffs are not to recover the balance of 199*l.* 8*s.* 7*d.* now due, and for which they have no security, only because they hold ample securities.

If the defendant were in this case in the situation of plaintiff, seeking to restrain the present plaintiffs from proceeding to recover this balance pending the account, the case of *Rawson v. Samuel* would, in form as well as in substance and principle, be a case in point; but the circumstance that the Bank is plaintiff makes no difference; that merely carries with it a submission, on the part of the plaintiffs, to give the defendant all he is in equity entitled to; but in this case he has no such equity as he contends for.

DECREE for payment of 199*l.* 8*s.* 7*d.*, with interest Account to be taken of the general dealings and transactions, &c. Further directions and costs reserved.

(a) See *Dodd v. Lydall*, 1 Hare, 333.

1843.—*Bristed v. Wilkins.*

BRISTED *v.* WILKINS.

[*235]

1843: Nov. 4.

After the order obtained by a judgment creditor, for charging the interest of his debtor in government stock, standing in the name of trustees, has been made absolute under the statute 1 & 2 Vict. c. 110, s. 15, the Bank of England is still bound to pay the dividends to the trustees, being the legal hands to receive them; and the trustees are to apply the dividends according to the equitable interests of the parties. Costs given to the Bank of England out of a trust fund of government stock, in the suit of the cestui que trusts for the application of the fund according to their interests, although the decree was made against the Bank,—the Bank having acted upon a doubtful construction of a late act of Parliament, before that construction had been settled by any judicial determination.

Semble:—A judgment creditor who has obtained an order charging the interest of his debtor in government stock may, in a proper case, sustain a suit for the intermediate protection of the interest which he has so acquired, notwithstanding the six months prescribed by stat. 1 & 2 Vict. c. 110, s. 14, have not expired.

UNDER the trusts of a settlement, made on the marriage of the defendant Sophia Wilkins, two sums of Bank 3*l.* per cent. Consolidated Annuities,—1768*l.* 19*s.* 1*d.* and 316*l.* 18*s.*,—stood in the names of trustees, (in the events which had happened,) to the separate use of the defendant Sophia Wilkins for her life, with remainder to her daughter, the defendant Georgiana Sophia Frazer, absolutely. In August, 1832, Sophia Wilkins, as surety, joined with her daughter Georgiana Sophia in executing a deed whereby the reversionary interest of the latter was assigned to A. Bain, by way of security for the sum of 800*l.*, and interest. Notice of the charge was immediately given to the trustees. By an indenture, dated in May, 1839, Sophia Wilkins, then a widow, and her said daughter, then the wife of the defendant Frazer, joined with Bain, (whose debt of 800*l.* was paid off by the plaintiff,) and with Frazer, in executing an assignment of the debt of 800*l.*, and the securities for the same, and the said trust funds, to the plaintiff, upon trust to secure the repayment of a sum of 1000*l.* borrowed from him, with interest for the same, and to apply the dividend in payment of such interest, and also in payment of the premiums of a policy of life insurance, assigned to the plaintiff as a collateral security, if such premiums were not otherwise paid.

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[*236] On the 28th of November, 1839, the defendant *Maude obtained final judgment in an action brought by him in the Common Pleas, against the defendant Sophia Wilkins, for 324*l.* 7*s.* 11*d.*, principal, interest, and costs; and, on the 17th of December, 1839, Maude obtained an order of Mr. Justice Coltman, nisi, for charging the said sum of 1768*l.* 19*s.* 1*d.* and 316*l.* 18*s.*, 3*l.* per cent. Consolidated Bank Annuities, with the sum of 324*l.* 7*s.* 11*d.*, the amount of the judgment; which order was made absolute, by an order of Mr. Justice Maule, as follows: "*I. M. Maude v. S. Wilkins.* Upon hearing the attornies or agents on both sides, and upon reading the order nisi made herein by the Honorable Mr. Justice Coltman, I do order that the sum of 1768*l.* 19*s.* 1*d.*, 3*l.* per cent. Consolidated Bank Annuities, standing in the names of the Reverend J. Webster, (since deceased) J. Hunt, and T. W. Clement, in trust for the defendant, and the further sum of 316*l.* 18*s.*, 3*l.* per cent. Consolidated Bank Annuities, standing in the names of the said T. W. Clement and J. Hunt, in trust for the said defendant, respectively, in the books of the governor and company of the Bank of England, shall stand charged with the payment of the sum of 324*l.* 7*s.* 11*d.*, being the amount for which judgment has been recovered in this cause and interest thereon, pursuant to the statute of 1st and 2nd of Victoria, c. 110. Dated the 18th of February, 1840.

" (Signed) W. H. MAULE."

On the 8th of February, 1841, after hearing the plaintiff, and other parties, a further order in the action was made by Mr. Justice Maule, as follows:—" *Maude v. Wilkins.* Upon hearing counsel on both sides, and upon reading the affidavits of &c., I do order that the order made herein, dated the 18th of February, 1840, shall be amended by making the said order apply to the

‘ interest of the defendant in the sums ’ therein mentioned

[*237] ed *instead of the sums themselves. Dated the 8th of February, 1841.

" (Signed) W. H. MAULE."

The Bank of England, being served by Maude with notice of

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the judge's order, refused to pay the dividends on the two sums of stock to the trustees or to the plaintiff. The bill was filed against Sophia Wilkins, C. Frazer, and Georgiana Sophia his wife, the trustees of the settlement, Maude, the judgment creditor, Bain, as a subsequent incumbrancer, and the Bank of England; and prayed that the charge of the plaintiff under the assignment might be established in priority to the charge obtained by Maude, and that the defendants, the cestui que trusts,—the judgment creditor,—or some of them, might pay to the plaintiff what should be found due to him for principal, interest, premiums, and costs, or that the defendants might be foreclosed; and that in the meantime the bank might be ordered to pay, and the trustees to receive, the dividends, and that the trustees might be ordered to pay the plaintiff a sufficient part of such dividends to satisfy what should be due and should accrue due to him for the interest and premiums. And the bill prayed that Maude and the bank might pay to the plaintiff so much of the costs, if any, as should not be payable out of the trust fund.

Mr. *Temple* and Mr. *Willcock*, for the plaintiff, insisted on the title acquired by him under the assignment prior to the judgment or to the judge's order; and argued that the bank was not justified in refusing to pay the dividends to the trustees. *Churchill v. Governor and Company of the Bank of England.*(a) They submitted *also that it was the duty of the trustees to have enforced their legal rights against the bank. [*238]

Mr. *Bagshawe*, for the trustees, submitted to act as the court might direct; but contended that the trustees, having no trust funds in their hands for such a purpose, were in no default for having declined to enter into a contest with the bank on a doubtful question.

Mr. *Roundell Palmer*, for the Bank of England, said, that after the decision of the court of exchequer, which, however,

(a) 11 Mee. & Wels. 323; and see *Fowler v. Churchill*, Id. 57.

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had been but recently pronounced, (a) it must be admitted that the bank might safely have continued to pay the dividends to the trustees, as the legal hands to receive them; but until the question of the effect of the judge's order, under the statute 1 & 2 Vict. c. 100, ss. 14, 15, had received the determination of a court of law, the bank was in a situation of great difficulty. Having notice of the order to show cause, which restrained the bank from permitting the stock to be transferred until the order was made absolute or discharged (s. 15,) and being bound to know that the statute provided that no proceedings should be taken in equity to have the benefit of the charge until after the expiration of six months from the date of the order, there was great reason to apprehend that the protection of the fund for the judgment creditor was, at least during the six months that the proceedings were suspended, wholly cast upon the bank.

The present suit having been instituted before the decision of the court of exchequer on the point, the bank was entitled to receive costs, as if it had been in fact the stakeholder.

[*239] *Mr. *Kenyon Parker* for other parties.

THE VICE-CHANCELLOR said, that he was not prepared to accede to the suggestion that a judgment creditor, having obtained a charge on the interest of his debtor in a sum of stock, was not entitled to institute a suit for the protection of his interest in the fund until six months after the order was made absolute, when the stock might be transferred and the charge thereby defeated. If the decision of the court of exchequer on the effect of the judge's order, so far as the bank was concerned, had been anterior to the refusal of the bank to pay the dividends in this case, the bank might not have been entitled to costs; but in the circumstances of the case, and without any authority for their guidance, the bank could not safely have acted otherwise than they had done. There was no question on any other point. The defendants not opposing, the court would decree a sale as more beneficial for the parties than a foreclosure; and the pro-

(a) April 19th, 1843.

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ceeds to be applied according to their several priorities. Further directions must be reserved : it might be a question between the defendants Wilkins and Maude, by whom their portions of the costs ought to be borne.

REFER it to the Master to tax the defendants (the trustees) and the Governor and Company of the Bank of England their costs of this suit as between solicitor and client, &c., and to tax the plaintiff and the defendants A. Bain and J. M. Maude their costs of this suit. And let the defendants (the bank) pay to the defendants (the trustees) the dividends now remaining unpaid and to accrue due before the sale hereby directed upon the two sums of 1768*l.* 19*s.* 1*d.* and 316*l.* 18*s.* bank 3*l.* per cent. &c., making together 2085*l.* 17*s.* 1*d.* like stock. And let the said defendants thereout pay (the bank) the amount of their costs when taxed, and retain their own costs when *taxed; and let them pay the residue thereof, after such [*240] payment thereout, to the plaintiff. Refer it to the master to take an amount of what is due to the plaintiff for principal and interest, and premiums in respect of his two several incumbrances after receipt of such dividends, and also to take an account of what is due to the defendant A. Bain in respect of principal and interest on his mortgage; and also to take an account of what is due to the defendant J. M. Maude for principal and interest on his charge. And let the defendants (the trustees) sell, and let the defendants (the bank) permit the said defendants (the trustees) to sell the said two sums of 1768*l.* 19*s.* 1*d.* and 316*l.* 18*s.* bank 3*l.* per cent. annuities; and let the defendants (the trustees) pay the produce of such sale to be verified &c. into court. Refer it to the master to inquire and state what is the value of the absolute reversion to the said sum of 2085*l.* 17*s.* 1*d.*, stock expectant on the decease of the defendant Sophia Wilkins. Let the master compute interest on the said sum of 800*l.* from the date of the indenture of the 15th of August, 1832, at &c., to the day on which he shall ascertain such value, and let him certify the total amount of the said sum of 800*l.*, the interest so computed, and the costs of this suit hereby directed to be taxed. And if the master shall find that the value of the said reversion exceeds the total amount of the said 800*l.*, the said interest, and the said costs, then let the amount of such excess to be certified &c. be carried over, with the privy, &c., out of the produce of the said sale when paid into &c., to an account to be entitled "The Account of Charles Frazer and Georgiana Sophia his wife." And let the same, when so carried over, be laid out &c. with the privy &c., "the like account," with liberty to any person or persons interested &c., to apply. And out of the residue of the money to be produced by the said sale, when paid into &c., after such carrying over as aforesaid, or out of the money produced by the said sale when paid into &c., if the amount which the master shall certify to be the value of the said reversion does not exceed what he shall certify to be the total amount of the said 800*l.*, the said interest, and costs, let, in the first place, what shall be found due to the plaintiff for principal and interest, and premiums in respect of his two several incumbrances, and the plaintiff's costs of this suit, when taxed, be paid; or, if not sufficient, so far as the same will extend, &c. And in case the principal, interest, and costs of the plaintiff shall be satisfied by the means aforesaid, let the plaintiff surrender or sell the

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policy effected by him, and let the produce thereof be paid into court to be verified &c. to the aforesaid account. And, in the second place, let what the master shall find to be due to the said defendant A. Bain for principal, interest, and costs, be paid &c., if sufficient for that purpose; but if insufficient, let such &c. be thereout paid so far as the same will extend. And in case the last-mentioned costs, principal, [*241] and interest, shall be satisfied by the means aforesaid, *and out of the before-mentioned funds, or the residue thereof, after the payments thereout hereinbefore directed, let what shall be found due for the costs, principal, and interest, of the defendant J. M. Maude be paid, &c. But in case the said funds shall be insufficient to pay such costs, principal, and interest, as last aforesaid, let such funds, or the residue thereof, to be verified &c. be paid as hereinbefore last directed, so far as the same will extend. And if there shall be any residue of the said funds after such payments as aforesaid, let such residue to be verified &c. be paid to the said defendant Sophia Wilkins. And for the better taking &c. (usual directions,) the master to make all just allowances. Reserve further directions, and subsequent costs. Liberty to apply.

 STAGG v. KNOWLES.

1843: Dec. 20, 21.

On the motion to dismiss the bill for want of prosecution, under the 16th and 17th (amended) orders of 1828, the court will not enter into the merits of the cause to determine whether the bill should be dismissed without costs; but will, with reference to the question whether the common order should be made, consider only the conduct of the parties in the cause in respect to its prosecution.

THE bill sought an injunction to restrain the defendants, Knowles, Day, and Hunter, from making sale, or disposing of, or parting with, certain goods and merchandize, and the gear, tackle, furniture, apparel, and ship's stores, lately of, or belonging to, the ship "Windsor Castle," save with the plaintiffs' consent, or under the direction of the court.

The bill and affidavits alleged that the "Windsor Castle," from London, bound to port Adelaide, was, in October, 1840, forced to put into East Cowes for repairs, and there to discharge her cargo; that the cargo was taken possession of by the defendant Day, who carried on the business of shipping agent under the name of Day & Son; that Day warehoused the cargo in a store, or warehouse, which he hired of the defendant Knowles, who acted as clerk or agent to the defendant Hunter, the lessee of the

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warehouse; that the defendants Knowles and Day refused to deliver up the cargo or stores of the ship, although payment of warehouse rent, exceeding anything which could reasonably be demanded, had been tendered *to the defen- [*242] dants; that the defendants claimed exorbitant sums, and threatened to hold the cargo and stores until the storeage amounted to about their value, and then to sell them for the charges.

The injunction was obtained in July, 1842, *ex parte*; and no motion was made to dissolve it. Knowles put in his answer on November, 1842, and a further answer in January, 1843. Day put in his answer in November, 1842, and a further answer in March, 1843. Hunter was out of the jurisdiction.

The defendant Knowles gave notice of motion, for the 5th of December, 1843, to dismiss the bill for want of prosecution.

In opposition to the motion, the plaintiffs filed affidavits stating, that Hunter not having paid the rent of the warehouse for two years, the landlord, in November, 1842, distrained, and the amount of the distress was paid on behalf of the owners of the goods; and the possession of them was subsequently obtained; that the object of the suit had been effected by the recovery of possession of the property; that Knowles, as the plaintiffs believed, was not in circumstances to pay any costs; that Day was in custody in Winchester gaol for a contempt in another cause, in disobeying an order of the court to deposit a box of 500 sovereigns, part of the same cargo; and that Hunter was out of the jurisdiction; that the further prosecution of the suit would occasion expense without benefit to any party. The defendant also filed affidavits relating to the transaction and the various actions and suits arising out of it, to which he had been a party.

Mr. *James Parker*, for the motion, relied on the 16th (amended) order of 1828; that order only followed the *statute 4 Ann. c. 16, s. 23,(a) which provided, that [*243] “upon the plaintiff’s dismissing his own bill, or the defendant’s dismissing the same for want of prosecution, the plain-

(a) An act for the amendment of the law and the better advancement of justice.

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tiff in such suit shall pay to the defendant, or defendants, his or their full costs." He also cited *Rutherford v. Miller*,^(a) *Monteith v. Taylor*,^(b) *Lyon v. Dumbell*,^(c) *Rhode v. Spear*,^(d) *Suckling v. Maddocks*.^(e)

Mr. *Russell* and Mr. *Campbell*, for the plaintiffs, submitted that, under the circumstances of the case, the costs of the suit ought not to be given to the defendants on the dismissal of the bill. The case was one in which the conduct of the defendants, and not the want of title in the plaintiffs, rendered the further prosecution of the suit useless: *Knox v. Brown*,^(f) *Blanshard v. Drew*.^(g) Even where a plaintiff had been misled by the state of the authorities, and the suit was therefore fruitless, the bill was at the hearing dismissed without costs: *Robinson v. Rosher*.^(h) The court might order the motion to stand over, giving the plaintiffs liberty to file a supplemental bill, to raise the question at the hearing. In *Broughton v. Lashmer*⁽ⁱ⁾ an administrator, not knowing the existence of a will, instituted a suit; and Lord Cottenham allowed the plaintiff, after a will was found, to dismiss his bill without costs.

VICE-CHANCELLOR :—I think I am bound in this case to make the order which is asked, or put the plaintiffs to the usual [*244] undertaking. "I had lately to consider the meaning of the 17th order, and I came to the conclusion that it was not intended by that order to alter the old practice to the extent of requiring the court to go into the merits of the cause on the common motion to dismiss for want of prosecution. Under that order, if the plaintiff does not prosecute his suit with a certain diligence, the court, on the defendant's motion, is to order the bill to be dismissed with costs, unless it "shall make special order to the contrary." I do not consider those words to mean that the special order which the court may make is to be found-

(a) 2 Anst. 458.

(b) 9 Ves. 615.

(c) 11 Ves. 608.

(d) 4 Madd. 51.

(e) 3 Y. & C. C. C. 232.

(f) 2 Bro. C. C. 186. S. C., 1 Cox, 359.

(g) 10 Sim. 240.

(h) 1 Y. & C. C. C. 7.

(i) Cited 1 Y. & C. C. C. 11.

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ed on an inquiry into the merits of the cause. The circumstances into which the court may enter, with the view of deciding on the proper order to be made, are, I think, those connected with the due prosecution of the suit; and it appears to me that the same observations apply to the 16th order. If in this case there are special circumstances which would render it improper that the plaintiffs should be placed in the position in which the common order would place them, such circumstances should be made the subject of a special application.

It was said, however, that, inasmuch as the defendant had entered into a contest with the plaintiffs upon the affidavits with respect to the facts, he had waived the benefit of the strict rule of practice in his favor. The plaintiffs cannot avail themselves of any objection on this ground. The party who has invited the discussion cannot complain of the other merely for accepting his challenge. The party who raised the discussion cannot be heard to say it was so immaterial that his opponent was bound to disregard it. The defendant does not, by entering into affidavits with reference to the case made by the plaintiffs, waive his strict right to the benefit of the 16th order; nor can I, upon this application, make any special order for leave to file

*a supplemental bill: the propriety of that course depends on the special circumstances of the case, into which my opinion is that I ought not now to enter. It must be remarked that the plaintiffs have known the whole of the facts of their case since November, 1842, and that they could not have been ignorant of the hostile position in which they stood as against the other parties to the cause.

THE plaintiffs undertook to speed.

1843.—*Cafe v. Bent*.

CAFE v. BENT.

1843: 18th, 20th, and 22d December.

The institution of a suit against trustees, for the administration of the trust estate under the direction of the court, does not preclude the exercise of the discretion given to the trustees by the will of the testator, as to the appointment of new trustees or the management of the trust; but the trustees are required, after the institution of the suit, to act under the control of the court.

THE testator, by his will dated in 1826, devised to his son J. Brown, J. Bent, and J. White, certain premises in trust for sale, and he gave to the same trustees various leasehold tenements, upon several trusts for his six children and their respective issue; and the testator gave and bequeathed the residue of his estate and effects to the said trustees, their executors, &c., for the use and benefit of the same six families,—the parents taking life estates, with remainders to their respective children; and he appointed Brown, Bent, and White his executors. The will contained a proviso, that, if either of them, Brown, White, or Bent, or any succeeding trustee or trustees to be nominated in their or either of their stead as thereafter mentioned, should, during the continuance of any of the trusts or powers created by or vested in them by the said will, happen to die, or refuse, or neglect, or become incapable to act in the execution of the said trusts or powers before the said trusts or powers should be fully executed and performed, then, and so often as the same should happen, it should be lawful to and for, and the [*246] testator thereby authorized and empowered, “the survivor of them, his said son J. Brown, and the said J. White and J. Bent, and such new trustee and trustees to be nominated in their or either of their stead,” as thereafter mentioned, by any writing or writings executed as therein-mentioned, to nominate and appoint any other fit and proper person or persons to be a trustee or trustees for the purposes aforesaid, or such of them as should be then subsisting or capable of taking effect in the stead of said J. Brown, J. White, and J. Bent, or either of them, or any future trustee or trustees so dying or desiring to be discharged, or refusing, or neglecting, or becoming incapable to act in the execution of the said trusts or powers; and that the

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old trustee or trustees should transfer and assign the trust estate, moneys, funds, and securities, upon the trusts and with the powers thereinbefore contained, so that the same might become vested in their surviving or continuing trustees or trustee, and in such new trustee jointly, their heirs, executors, &c., or in such new trustees entirely, their heirs, executors, &c. respectively, according to the nature and quality of the premises upon the same trusts; and that such new trustees or trustee, his and their heirs, executors, &c. might act in the management and execution of the said trusts and powers in like manner as if he or they had been originally named a trustee or trustees by the said will.

Brown and Bent proved the will in 1828, and took upon themselves the trusts. White renounced probate, and by deed disclaimed the trust estate. Brown and Bent sold the real estate and invested the proceeds. Brown died in 1840.

In 1842 the plaintiff purchased and became the assignee of the interest of a child of one of the testator's children in a portion of the trust estate ;(a) and, in *May, 1843, [*247] he filed the bill against the representative of Brown, the son, Bent, the surviving trustee and executor, and the parties beneficially interested, suggesting that Bent was of an advanced age, and not equal to the management of the trust property; and praying that accounts of the personal estate of the testator possessed by Brown and Bent might be taken, and the receipts of Brown answered by his representative, and that new trustees might be appointed in the place of Brown and White, and for a receiver.

After the institution of the suit, Bent, assuming to exercise the power which he was advised that the will gave him, executed a deed dated in July, 1843, whereby he appointed Hawkins and Gibbs Bent new trustees, in the place of White and Brown. The plaintiff amended his bill in August, and filed a supplemental bill in November, 1843, against the original defendants and the new trustees, stating the subject of the original bill,—the power given by the will of appointing new trustees; and

(a) A point was raised by the answers whether the share in question passed by the assignment to the plaintiff.

 1843.—*Cafe v. Bent*.

the execution of the deed of July,—charging, that the pretended appointment of new trustees was thereby made at the request of the defendants, the other parties beneficially interested, for the purpose of preventing the trust funds from being brought into court; and praying the benefit of the former suit,—a declaration that Hawkins and Gibbs Bent were not duly appointed trustees, and that Bent might be restrained from transferring the trust funds and the stock standing in the names of Brown and Bent into the names of the new trustees.

The plaintiff gave notice of motion intituled in the supplemental suit only, for the injunction to restrain the transfer of the stock to the new trustees and Bent.

[*248] *For the motion,—Mr. *Roupell* and Mr. *Piggott* argued, first that the defendant Bent, although the survivor of the two trustees who had acted, was not the sole survivor of the three persons named by the testator, White being still living; and that, therefore, Bent had not power alone to make a valid appointment of new trustees. *Townsend v. Wilson*.^(a) Secondly, that, after a suit was instituted, Bent, if he had a legal power to appoint new trustees, was not justified in making the appointment out of court: *Webb v. Earl of Shaftesbury*,^(b) *Attorney General v. Clack*.^(c)

Mr. *Russell* and Mr. *C. R. M. Jackson*, for the defendants, on the power of Bent, the trustee, to appoint other trustees, cited *Eaton v. Smith*,^(d) 1 Sugden on Powers, 145, 151, Ed. 6; and they argued, that the existence of the suit did not deprive the trustee of the right, or relieve him from the duty, of providing for the due transmission of the trust. It was not a case of money in the funds only, which might be transferred into court, and the place of trustees thus supplied; but it was a case in which the property included tenements held for various terms of years, and the active interposition of the party having legal title might at any moment be required.

(a) 1 B. & A. 608. See Jac. 193, and 11 Sim. 564.

(b) 7 Ves. 480.

(c) 1 Beav. 467.

(d) 2 Beav. 236.

1843.—*Cafe v. Bent*.

VICE-CHANCELLOR :—The questions which have been raised in this case, are, first, whether the appointment of new trustees which has been made since the institution of the suit can be sustained; secondly, whether, supposing the existence of *the suit to be no objection, the appointment is in it- [*249] self a due execution of the power given by the will; thirdly, whether sufficient ground for the motion can be found in the supplemental suit, in which alone it is made; and, lastly, whether the notice given by the defendants, of reading on the motion the answers to the amended bill, is or is not a vexatious proceeding, which should be visited with costs.

There is no authority for the proposition, that the mere filing of a bill in this court has the effect of suspending the power given by the will to the surviving or remaining trustee. There is no reason why the mere institution of a suit, which may never be prosecuted, should have the effect of preventing trustees from exercising their discretion. Where, indeed, the court has assumed the execution of the trusts, it would be highly inconvenient, if not impracticable, that the trustees should afterwards act independently of the court. The court does not, however, in the absence of any misconduct in the trustees, deprive them of the exercise of their discretion, but only requires them to act under the control of the court. That is all that the case of *Webb v. The Earl of Shaftesbury*(a) decides upon this point. If the trustees, by acting independently of the court after the suit has been instituted, should occasion expense which might have been avoided if they had acted under the direction of the court, they may be made to pay the expense occasioned by such conduct. The decision in *The Attorney-General v. Clack*(b) is to that effect. But the mere filing of a bill cannot have the effect of preventing trustees from doing acts which are necessary to the due execution of the trust which is imposed upon them. Such a rule might, in many cases, operate to destroy the trusts altogether.(c)

(a) 7 Ves. 480.

(b) 1 Beav. 467.

(c) See *Hibbert v. Hibbert*, 3 Mer. 681; *Williams v. Corbet*, 8 Sim. 349.

1843.—*Cafe v. Bent*.

[*250] *In this case it appears that the appointment of the new trustees was noticed in the amended bill, and no objection was taken by the defendants that it was supplemental matter. No inconvenience or expense was therefore occasioned by the appointment ; for the court, when called upon to act in the cause, would have before it the new trustees, and the inconvenience pointed at in *Webb v. The Earl of Shaftesbury* cannot arise. Whether the stock should stand in the name of one trustee, or in the names of all—all being before the court—the trustees and the stock are equally under its control. If, therefore, the appointment be valid, I am of opinion that the date of the appointment is not, *per se*, a ground for restraining the transfer of the stock ; nor can it possibly affect the rights and interests of the plaintiff.

The question which has been raised on the power of the acting trustee to make the appointment of new trustees under the words of the will, is one which the court ought not to decide upon motion, if the decision upon the point can properly be deferred ; and it appears to me, that, in this case, it is a question which may, without prejudice to the interests of the parties, be reserved until the hearing.

[His Honor disposed of the other points, observing, that, without the answers, of the reading of which the defendants had given notice, there would not have been in the supplemental suit, facts before the court to sustain the motion ; and that the answers raised a question on the title of the plaintiff. The defendants, by consent, undertaking not to transfer the stock, the costs of the motion were reserved.]

Osborne v. Foreman, 25th June, 1844, V. C. Wigram.—The testator directed, that, in case of any suit being instituted in relation to the estate, one of the trustees, who was a solicitor, should act as solicitor to the trust, and be allowed his charges.—Estates decreed to be sold under the direction of the Master, the trustees to have the conduct of the sale.

1844.—Webb v. Salmon.

*WEBB v. SALMON.

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1844: January 31; February 12.

In 1834, S. employed B. as his agent and solicitor in the matter in question, and B., in that capacity, corresponded with W. thereon. In 1843, S., who then resided abroad, being informed that the representative of W. was about to file a bill against him on the same matter, directed that he should be referred to B., in whose hands the matter had been. B. stated that he had no authority to appear for S., and was not professionally concerned for him:—*Held*, that service on B. of the subpoena to appear and answer the bill, could not be substituted for service on S.[1]

THE bill was filed by the heir-at-law of the mortgagor against a mortgagee, who, under a power of sale, had sold the mortgaged premises, praying an account of the receipts of the defendant as mortgagee in possession before the sale, an account of the proceeds of the sale, and payment of the surplus to the plaintiff.

Mr. *Lewis* moved *ex parte* that service of the subpoena to appear and answer upon Messrs. Bayley, might be good service on Salmon, the defendant.

The motion was supported by the affidavit of the plaintiff's solicitor, which stated, that the defendant, some time before the bill was filed, had left this country, and that he still continued abroad, residing, as the deponent believed, at Rome; that the deponent had called on Messrs. Hillier & Lewis, solicitors, (who, as the deponent had been informed and believed, acted for many years as the town agents and solicitors of the defendant when he practised as a solicitor at Devizes,) and left with them a copy of the bill, and inquired whether they would enter an appearance for the defendant Salmon; that Hillier & Lewis declined to do this without instructions from Salmon, and promised to communicate with him on the subject; that, on the 18th of November, 1843, Hillier & Lewis returned the draft bill to the deponent, in-

[1] As to substituted service of subpoena, see *Hobhouse v. Courtney*, 12 Sim. 140; *Norton v. Hepworth*, 1 Hall & Twell, 159; *Weymouth v. Lambert*, 3 Beavan, 333; *Murray v. Vipard*, 1 Phil. 521; *Hornby v. Holmes*, 4 Hare, 306; *Cooper v. Wood*, 5 Beavan 391; *Noad v. Backhouse*, 2 Y. & Coll. 529.

1844.—Webb v. Salmon.

forming the deponent that they had written to the defendant in Italy, acquainting him with the nature and object of the bill, and requesting to know whether he would wish them to appear for him, and stated that they had received, in reply, a letter containing a paragraph to the effect that “this matter (meaning [*252] the matter of the suit) had been already in the hands of Messrs. Bayley, solicitors, of Devizes, and the defendant desired that Messrs. Hillier & Lewis would refer the deponent to Messrs. Bayley on the subject.” That, in the year 1834, Messrs. Bayley had been employed, as the solicitors of the defendant, in communication with the plaintiff’s father (then the heir-at-law of the mortgagor) with reference to his claim on the defendant in respect of the same matter; that the defendant had on that occasion distinctly referred the heir-at-law to Messrs. Bayley, as his solicitors, in any steps which might be taken, and Messrs. Bayley accordingly then corresponded with the heir-at-law in the character of solicitors for the defendant; that, since the communication from Hillier & Lewis in November, 1843, frequent applications had been made to Messrs. Bayley to enter an appearance for the defendant, and that they had refused so to do.

He cited in support of the application, *English v. Hendrick*,^(a) *Kinder v. Forbes*.^(b)

HIS HONOR said there was not a sufficient statement of the recent communications with Messrs. Bayley to justify the substituted service upon them, and he refused the motion.

February 12th.—The motion was renewed upon further affidavits to the effect, that on the 18th of November 1843, the deponent, the plaintiff’s solicitor, wrote to Messrs. [*253] Bayley, reminding them that, as the defendant’s solicitors, they had some years before corresponded with the solicitor of the heir-at-law on the matter in question; stating that a bill had been filed against the defendant; and also stating

(a) 6 Madd. 205.

(b) 2 Beavan, 503.

1844.—Webb v. Salmon.

the subsequent communications on the subject with the defendant through Messrs. Hillier & Lewis, and adding "I request the favor of you to instruct your agent to enter an appearance at your early convenience." That Messrs. Bayley replied by a letter, dated the 21st of November, 1843, stating their intention to consult with Messrs. Tugwell & Meek, the firm from which the defendant had recently retired, on the subject, and promising to write to the plaintiff's solicitor after such consultation; that, after some letters between the deponent and Messrs. Bayley, pressing for and promising an answer, Messrs. Tugwell & Meek wrote to the deponent a letter, dated the 5th of December, 1843, as follows:—"Messrs. Bayley have been with us to-day on the subject of this claim, and they have requested us to beg of you to be good enough to say what it is to which your client lays claim, how or through whom he claims, and how he proposes to establish his claim. A candid reply to these inquiries may probably save a good deal of trouble and expense, and as they are questions which, at some stage of the proceedings, you will be called upon to answer, we do not anticipate that you can have any hesitation in now replying to them. It is not the wish of Messrs. Bayley or ourselves to put your client to unnecessary trouble or expense, and, if he can show to our satisfaction that he is in a position to establish the claim which he sets up, he will probably, by taking this course, arrive much more speedily at the result he aims at than he would by a hostile course." That the deponent, on the 11th of December following, in answer to the last letter, wrote

*to Messrs. Tugwell & Meek as follows:—"I do not con- [*254]
sider that I have any authority from Mr. Salmon to correspond with you in reply to the inquiries which your letter contains; I shall, however, have pleasure in corresponding with you on the matter when you have appeared in the suit. I cannot but express my surprise, that, after the letter I have addressed to Messrs. Bayley, they have not yet candidly declared their intention, until they or you have appeared in the suit, I must decline to enter further than has already been done into the nature and grounds of my client's claim; you may rest perfectly satisfied of my desire to avoid litigation and expense so far as can

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possibly be done." That the deponent, in reply, received from Messrs. Bayley a letter, dated the 13th December, 1843 :—We had purposed writing to you on Friday last, after seeing Messrs. Tugwell & Meek, but it entirely escaped our recollection. As these gentlemen are concerned for Mr. Salmon, the person against whom you have filed your bill, the matter rests entirely with them to correspond with you upon ; we would, however, venture to suggest, that meeting the question in a fair and open manner might be the means of avoiding much expense and trouble to all parties concerned." That on the 23d of January, 1844, the deponent received from Messrs. Bayley a letter as follows :—
"After having told you that we declined appearing in this suit for Mr. Salmon, we are surprised to hear that you have made an *ex parte* application to the Court of Chancery that service of subpœna upon us may be deemed good service on Mr. Salmon. To prevent any mistake, we beg distinctly to inform you that we have no authority to appear for Mr. Salmon in this or any other suit or action, and must request of you that, should your application be received without notice to us, you will put [*255] the court in possession of this communication ; otherwise, we shall consider that you are not dealing fairly, either by Mr. Salmon or ourselves. Messrs. Tugwell & Meek, as we have before informed you, are the only parties that we are aware of who are professionally engaged for Mr. Salmon, and we have, therefore again to request you that you will communicate with them in this matter." That Messrs. Hillier & Lewis, on the 23d of January, 1844, informed the deponent that they had not received any further communication from the defendant Salmon.

Mr. *Lewis*, for the motion.

VICE-CHANCELLOR :—This is an application *ex parte*, that service of the subpœna to appear and answer the bill upon Messrs. Bayley, solicitors, residing at Devizes, may be good service upon the defendant Salmon.

In *Hobhouse v. Courtney*(a) the Vice-Chancellor of England

(a) 12 Sim. 140.

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(differing, perhaps, in some respects from Lord Redesdale and other judges) was of opinion that service of the subpoena upon an agent should be good service on the principal, he being abroad, where it appeared that the agent had special authority, at the time the order was made, to act for the absent defendant in the very subject-matter of the suit. Beyond that case I am not prepared to go. But applying that rule to this case, it is clear that Messrs. Bayley were not agents in the [*256] matter of the suit when the correspondence with the plaintiff's solicitor commenced, and so far are Messrs. Bayley from now being the agents of Salmon in *hac re*, they have, after communication with Messrs. Tugwell & Meek, distinctly refused to accept such agency, and have referred the plaintiff to Messrs. Tugwell & Meek, as the only parties who are professionally concerned for Salmon. There is not that appointment of Messrs. Bayley as the solicitors or agents of the defendant, which the observations of the Vice-Chancellor, in the case of *Hobhouse v. Courtney*,^(a) assume to be necessary.

Great care is necessary in cases like these, when the important consequences of entering an appearance for a party are considered. In the present case I am clearly of opinion that I cannot treat as agents of the plaintiff persons who are not, and who have refused to be such agents.

Motion refused.

(a) 12 Sim. 154.

 1843.—Townsend v. Carus.

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*TOWNSEND v. CARUS.

1843 ; 22nd Dec. 1844 ; 11th January.

A bequest of a legacy to trustees "upon trust to pay, divide, or dispose thereof, unto or for the benefit or advancement of such societies, subscriptions, or purposes, having regard to the glory of God, in the spiritual welfare of His creatures, as they shall in their discretion see fit," construed to be a gift for religious purposes, and restricted to such purposes.

A bequest for a religious purpose is a valid charitable bequest, although the paramount religious object might, possibly, be effected by an application of part of the fund to a purpose which, separately taken, would not be strictly charitable.[1]

SARAH ATKINS, by her will, dated in 1837, after giving various legacies, disposed of the residue of her estate in the follow-

[1] It has been held in some cases but doubted in others, that courts of equity had inherent jurisdiction in regard to charities and charitable uses independent of any statute. In the case of *Shotwell, ex'r. v. Mott et al.*, 2 Sandf. Ch. R. 46, Assistant Vice-Chancellor Sandford held, that charitable uses were bestowed in England, and recognized by law, before the Norman conquest ; and they were always fostered and protected by the common law. They were subject to the jurisdiction of the court of chancery long before the statute of charitable uses, 43 Elizabeth ; and this whether the trustees were corporations or individuals, and whether the gifts were to trustees by name, or for a definite and specific object without naming trustees. See also *Burr, ex'r. v. Smith*, 7 Vermont R. 241 ; *Beatty and Ritchie v. Kurts*, 2 Peters, 584 ; *Inglis v. Trustees of Sailors Snug Harbor*, 3 Peters, 113 ; *Miller v. Gable*, 2 Denio, 492. Chancellor Walworth, in the case of *The Reformed Dutch Church in Garden Street v. Mott et al.*, 7 Paige Ch. R. 77, held that the statute of Elizabeth relative to charitable uses was never in force in the State of New York. But independent of that statute the court of chancery had an original jurisdiction to enforce and compel the performance of trusts for pious and charitable uses, when the devise or conveyance in trust was made to a trustee capable of taking the legal estate. See also *Kniiskern v. The Lutheran Churches of St. Johns and St. Peters*, *Philip Wieting et al.*, 1 Sandf. Ch. R. 439 ; *Potter v. Chapin*, 6 Paige Ch. R. 639 ; *Vidal v. Girard's ex'r's.* 2 Howard, 127. In the case of *The Baptist Association v. Hart's ex'r's.*, 4 Wheat. R. 1, the court held that a charitable bequest, where no legal interest is vested, and which are too vague to be claimed by those for whom the beneficial interest was intended cannot be established by a court of equity, either exercising its ordinary jurisdiction, or enforcing the prerogative of the king as *parens patriæ*, independent of the statute 43 of Elizabeth. In this case there were two circumstances which undoubtedly had an influence on the decision ; first, that case arose under the law of Virginia, in which state the statute of 43 Elizabeth, had been expressly and entirely abolished by the legislature, so that no aid could be derived from its provisions to sustain the bequest. 2d. The donees, the trustees, were an unincorporated association, which had no legal capacity to take and hold the donation in succession for the purposes of the trust, and the beneficiaries were also

 1843.—Townsend v. Carus.

ing words:—"And now, having provided for those who are connected with me, or have claims upon me, I do bequeath the

uncertain and indefinite. Both circumstances, therefore, concurred; a donation to trustees incapable of taking, and beneficiaries uncertain and indefinite. The court, upon the occasion, went into an elaborate examination of the doctrine of the common law on the subject of charities independent of the statute of 43 Elizabeth, ch. 4, for that was still the common law of Virginia. Upon a thorough examination of all the authorities the court came to the conclusion that, at the common law, no donation to a charity could be enforced in chancery, *where both* of these circumstances, or rather where both of these defects occurred. In the case of *Vidal et al. v. Girard's exr's.*, 2 Howard R. at pages 193, 194, 195, 196, Mr. Justice Story reviewed and collected the cases on the question of the inherent power of the court of chancery over charitable uses, independent of the statute, and arrived at the conclusion that they established in the most satisfactory and conclusive manner that cases of charities where the trustees were appointed for general and indefinite charities, as well as for specific charities, were familiarly known to, and acted upon and enforced in the court of chancery long before the statute of Elizabeth. In that case he adds, "whatever doubts, therefore, might properly be entertained upon the subject when the case of *The Trustees of the Philadelphia Baptist Association v. Hart's exr's.*, was before the court (1819,) those doubts are entirely removed by the late and more satisfactory sources of information to which we have alluded." See *Eyre v. Countess of Shaftesbury*, 2 P. Wms. 102; *Attorney General v. Tancred*, 1 Eden R. 10; *The Attorney General v. The Skinners Co.*, 2 Russell, 407; *Attorney General v. The Masters of Brentwood School*, 1 Myl. & K. 376; *The Attorney General v. Mayor of Dublin*, 1 Bligh's R. 312; *The Incorporated Society v. Richards*, 1 Drury & Warren, 258. In the latter case the point was expressly raised and decided by Lord Chancellor Sugden, who held that there is an inherent jurisdiction in equity in cases of charities, and that charity is one of those objects for which a court of equity has at all times interfered to make good, that, which, at law was an illegal or informal gift; and that cases of charity in courts of equity in England were valid independently of and previous to the statute of Elizabeth. See also *Witman v. Lex*, 17 Serg. & Rawle, 88. Lord Redesdale, in the case of *The Attorney General v. Corporation of Dublin*, 1 Bligh N. S. 312, said "that the statute only created a new jurisdiction, it created no new law; it created a new and ancillary jurisdiction; a jurisdiction borrowed from the elements which I have mentioned; a jurisdiction created by a commission to be issued out of chancery, to inquire whether funds given for charitable purposes had or had not been misapplied, and to see to their proper application; but the proceedings of that commission were made subject to appeal to the Lord Chancellor, and he might reverse or affirm what they had done, or make such order as he might think fit, for reserving the controlling jurisdiction of the court of chancery, as it existed before the passing of the statute; and there can be no doubt that by information by the Attorney General the same thing might be done." Lord Chancellor Sugden in the case of *Incorporated Society v. Richards*, above cited, says "It is impossible to read this passage without being of the opinion that Lord Redesdale meant to convey, that independently of and prior to the statute, the court

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residue and remainder of my property and effects, after and subject to the payment of my debts, funeral and testamentary and other incidental charges and expenses, unto my friends, the Rev. William Carus, Minister of Trinity Church, Cambridge, where I have been used to worship, and to the Rev. George Spence, late assistant curate of the said church, now vicar of St. Clement's in the said town, upon trust to pay, divide, or dispose thereof unto or for the benefit or advancement of such societies, subscriptions, or purposes, having regard to the glory of God in the spiritual welfare of His creatures, as they shall in their discretion see fit : and I entreat them to undertake the office of almoners of my residue, and to permit me to nominate them to be executors of this my will. My motive in thus constituting these

had a controlling power as to gifts to charitable uses, and that the statute, whilst it created a new machinery, with which to work, did not give a new jurisdiction to this court, neither did it make a new law. See 1 Drury & Warren, 317, 310. It has been supposed by some that the doctrine laid down in the case of *The Baptist Association v. Ward*, 1 Wheaton, 1, was overruled or at least shaken by the case of *Vidal v. Girard's exr's*. But it will be seen upon an examination of Mr. Justice Story's opinion in the latter case that he notes the distinction between the two cases, and that the doctrine of the case in 4 Wheat. 1, so far as it relates to the question whether chancery has jurisdiction independent of the statute to enforce charities where the objects are *indefinite* and *uncertain* is not impugned or overruled in the case of *Vidal v. Girard's exr's*. In the latter case the court said "it has been decided by the Supreme Court of Pennsylvania, that the conservative principles of the statute of Elizabeth have been in force in Pennsylvania by common usage and constitutional restriction." Thus it will be perceived that the statute of Elizabeth was operative in Pennsylvania. In the subsequent case of *Wheeler v. Hugh Smith et al.*, 9 Howard, 55, the Supreme Court of the United States have held that the statute of Elizabeth, respecting charitable uses having been repealed in Virginia, the court of chancery have no jurisdiction to decree charities where the objects are *indefinite* and *uncertain* : thus holding that if one of the circumstances or defects existed which existed in the case of 4 Wheat. 1, the court of chancery had no jurisdiction. The decision in the case in 9 Howard, 55, was placed upon the ground that charitable trusts, independent of the statute after its repeal rested upon the same footing as other trust, and that inasmuch as it had been settled by numerous decisions, that if a trust be created in a party, but the terms by which it was created are so *vague* and *indefinite*, that courts of equity cannot clearly ascertain either its objects or the persons who are to take, then the trust will be held entirely to fail, and the property will fall into the general funds of the author of the trust. That a trust for charitable uses, following within the same category on the ground of vagueness and indefiniteness shared the same fate. That in Virginia charitable bequests stand upon the same footing as other trusts, and consequently required the same certainty as to the objects of the trust, and the mode of its administration.

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gentlemen residuary legatees and executors springs from the confidence which I have in their judgment and faithfulness, and the conviction that they will apply and dispose of the residue of my little property (the amount of which is at present involved in uncertainty and doubt) in a better manner for the furtherance of His honor from whom I received it all than I myself could, did I know its full amount; and I pray God to bless it to such purposes, and to bless them in the disposal of it."

The testatrix died in 1843. The will and a codicil, giving other legacies, were proved by the executors. The plaintiff claimed as one of the next of kin of the testatrix, [*258] and was also a pecuniary legatee under the will. The suit was instituted for the administration of the estate, and payment of the plaintiff's legacy; and it also prayed a declaration, that the bequest of the residuary estate was void, and that the next of kin of the testatrix was entitled thereto; and that it might be referred to the master to inquire who were such next of kin. The Attorney General was made a party.

The defendants, the executors, admitted assets sufficient to pay the pecuniary legacy to the plaintiff.

Mr. *Prior*, for the plaintiff, argued that the residuary bequest was void as not necessarily charitable, and otherwise too indefinite to be executed by the court. The question was not whether the trustees might distribute the fund in purposes that would be strictly charitable, within the legal meaning of that word, without any breach of trust, but whether they were bound to apply the fund to such strictly charitable purposes: *Morice v. Bishop of Durham*,^(a) *James v. Allen*.^(b) If the trustee under this bequest might devote the whole or any part of the trust fund to objects not charitable within the definition of this court, (9 Ves. 405, 10 Ves. 541, 3 Mer. 19,) the gift must fail. It was difficult to deny that in this case the fund might be applied according to the trust, and yet not in charity; it was to be applied for the benefit of societies, subscriptions, or purposes at the discretion of the trustees. What was to govern their discretion?—a "regard to the glory of God in the spiritual welfare of His crea-

(a) 9 Ves. 399, S. C.; 10 Ves. 522.

(b) 3 Mer. 17.

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tures." Many instances might be adduced in which individuals had considered themselves as acting scrupulously with regard to what the testatrix pointed out, and yet had [*259] arrived at *consequences little reconcileable with charity in any sense. A regard to the object here referred to, operating in one temper of mind, in a former age, led to the infliction of the punishment of death for heresy; and a like regard, in another temper, and in modern times, manifested itself in the formation of societies for the propagation of heresy. In the University of the town amongst the clergymen of which the testatrix had selected her trustees, many wealthy individuals had formed themselves into a society for the purchase of advowsons, in order, as it was said, to present persons who were willing to pledge themselves to calvinistic or other opinions, forming no part of the confession of faith, or subscription of doctrine, which the church required. Was it not possible that the trustees in this case might consider the advancement of the objects of that society a proper employment of the trust fund? and what was there in the language of the will to prevent such an application? Or, suppose the trustees should think it proper to indemnify a clergyman, who acting on opinions in which they coincided, had subjected himself to the penal jurisdiction of the ecclesiastical courts; or, again, suppose they should think it within the scope of their trust to purchase a living for some popular preacher; it could scarcely be said that there was anything to restrain them from adopting any of these modes of carrying the trust into effect. The only word in the will which could be considered as intimating a more limited application of the trust fund was the word "almoners," by which the testatrix subsequently designated her trustees; but it was clear, from the context, that this word was not used in any strict sense, but merely as synonymous with "distributors." The only mode in which the court could deal with this gift, was, to declare the defendants, the executors, trustees for the next of kin of the [*260] testatrix: **Brown v. Yeall*,(a) *Williams v. Kershaw*,(b) *Ellis v. Selby*.(c)

(a) 7 Ves, 50, n.

(b) 1 Keen, 232.

(c) 1 Myl. & Cr. 290.

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Mr. *Rolt*, for the executors, argued that the words of the will expressly pointed to religious objects only : that “the benefit or advancement of societies, subscriptions, or purposes,” were only modes by which the religious object was to be promoted ; and that any application of the fund to other than religious objects would be a breach of trust for which the trustees would be accountable in this court. A religious purpose being strictly a charitable purpose, in the technical or statutory sense, (*Baker v. Sutton*,(a)) it followed that the bequest in this case must be supported as a charitable gift : even the word “pious” had been held not to enlarge the object of a charitable legacy so as to render it indefinite and void, although that term might well be understood to admit a more extensive signification, involving duties unconnected with any religious system : *Attorney General v. Herrick*.(b) If, therefore, the fund might be applied in a manner of which the religious tendency could be a subject of question by different minds, yet there could certainly be no application to purposes which were not pious ; and that character was sufficient to establish the trust. In truth, although the testatrix had given her trustees a large discretion, yet she had not created an indefinite trust, or any trust which the court was not competent to execute.

Mr. *Wray*, for the attorney general, also supported the validity of the gift in question, as a charitable gift : *At- [*261]
torney General v. Stepney,(c) *Mitford v. Reynolds*,(d)
Miller v. Rowan.(e)

1844 : Jan. 11th,—VICE-CHANCELLOR :—If this is a bequest for religious purposes, I think I am bound to hold it a charity within the decided cases. The cases referred to in *Baker v. Sutton*,(d) and that case itself, are sufficient authorities on this point.

The two questions to be considered are, first, whether the purpose indicated by the words “having regard to the glory of God, in the spiritual welfare of His creatures,” is a religious purpose ;

(a) Per Lord Langdale, 1 Keen, 233.

(c) 10 Ves. 22.

(e) 5 Cl. & Fin. 100.

(b) Ambl. 712.

(d) Phill. 185.

(f) 1 Keen, 231.

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and, secondly, whether, admitting the purpose indicated by those words to be a religious purpose, those same words imperatively require the application of the whole fund to such a purpose, or leave it to the trustees, in the exercise of an honest discretion, to apply either the whole or any part of the fund to purposes not inconsistent with "the spiritual welfare of God's creatures," though not strictly religious purposes.

For the purpose of answering the first question, I think the will must be read as if the testator had directed the property to be applied in promoting "the spiritual welfare of God's creatures," and I think that a purpose so expressed would be a religious, and therefore a charitable purpose. The word "almoners," I may observe, favors the argument upon the general intention. It was said that ways of expending the property might be suggested which might be conducive to spiritual welfare, but which, separately taken, would not, in themselves, be charitable.

[*262] Without inquiring whether that proposition can be maintained, it appears to me sufficient to say, that if, as I think the case is, the end proposed by the testatrix is charitable, no expenditure can be lawful which is not directly conducive to that end; and the end itself cannot lose its charitable character only because parts of the machinery admissible for its accomplishment are not, in themselves, abstractedly considered, charitable. Writing, for example, is not grammar; but, if grammar cannot be so well learnt without first learning to write, that may be taught in a pure grammar-school, as a step to the learning which is its proper object. Modern decisions have, in fact, proceeded upon that principle.

Upon the second point, I think the words "having regard to the glory of God in the spiritual welfare of His creatures," are restrictive,—even if they are read as merely directory to the trustees. But I am not clear, that, in strict construction, the words ought not to be connected with the immediate antecedents "societies, subscriptions, and purposes," so as to describe the societies, subscriptions, and purposes indicated by the testatrix. In order to make them simply directory, the words "as they" should have preceded the word "having." It is not, however, necessary to rely on this point of construction.

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The decree will be made for the payment of the legacy. I do not dismiss the bill as to the rest of the prayer. I simply direct the payment of the legacy, and direct the costs of all parties to come out of the estate.

TAYLOR v. COATES.

[*263]

1843: 21st and 22nd December.

A., seised in fee, mortgaged for a term of years, and afterwards devised the mortgaged premises, and died. The mortgagee brought his bill against the devisees, some of whom were infants, for foreclosure:—*Held*, that the defendants, during the infancy of the devisees, were not entitled to a decretal order on motion, under the stat. 7 Geo. 2, c. 20, s. 2, or under the general jurisdiction of the court, to take an account of what was due.

COATES, being seised in fee of an estate, demised it to Taylor for a term, on mortgage; and afterwards devised the estate to the defendants, Jemima, Elizabeth, and Henry, for their lives successively, with remainder to the defendant William, his heirs and assigns, and in case of his death before he became entitled thereto, to the defendant John, his heirs and assigns: and he appointed Elizabeth, and Henry and another, executors and executrix, and died. Taylor died, and the bill was filed by his personal representatives for foreclosure. The devisees, William and John, were infants, and put in the common infants' answer, submitting their rights to the court. The other defendants admitted the mortgage.

Mr. *Green*, on behalf of the defendants, moved for a reference to take an account of what was due to the plaintiffs, for principal, interest, and costs on their mortgage securities, stated in the bill; and that, upon payment thereof, within six months after the Master should have made his report, the plaintiffs might re-convey the premises; and that, in the meantime, proceedings in the suit, and also in an action of ejectment brought by the plaintiffs against one of the tenants, might be stayed.

1843.—Taylor v. Coates.

The motion was founded, first, on the statute 7 Geo. 2, c. 20, s. 2;(a) secondly, on the general jurisdiction of the court to stay proceedings where the defendant submitted to the plaintiff's demand; (*Praed v. Hull*),(b) which had been frequently [*264] acted upon in late cases;(c) and, lastly, upon the principle that the court would interfere to protect the property of infants, in cases where it would not interfere for the benefit of parties *sui juris*.(d)

Mr. *Romilly*, and Mr. *Jeremy*, for the plaintiffs, submitted, that the defendants, owing to the infancy of the devisees, were not in a situation to give the mortgagees the benefit of the foreclosure on motion, in the event of payment not being made; and, for the same reason, the defendants were incapable of admitting the plaintiffs' title, so as to bind themselves. In such circumstances the stay of proceedings might defeat the plaintiffs' remedy, at least in this suit: *Lushington v. Price*.(e)

Mr. *Green*, in reply, said that the executors of the mortgagor were competent to admit, and pay the amount of the mortgage debt; and therefore they were competent to make every admission which the mortgagee had any interest in requiring. A creditor could not refuse to receive payment of his debt, from the executor of his debtor, and insist that his debt should still remain a charge on the estate, on the ground that there were infants interested who might afterwards dispute the propriety of the payment: *Grane v. Mitchell*.(f) If, however, the presence of infants on the record constituted any objection to the order being absolutely made in the first instance, it might be referred to the Master to inquire, whether the course proposed to be taken would be for the benefit of the infants.

The VICE-CHANCELLOR said, that the admission of the debt

(a) See *Piggin v. Chestam*, 2 Hare, 80.

(c) See 2 Hare, 561, n. (b.)

(e) 9 Sim. 651.

(b) 1 Sim. & St. 331.

(d) See 1 Hare, 602, n. (a.)

(f) 10 Sim. 484.

 1843.—Taylor v. Coates.

was not the difficulty; the question was, whether *the court, in the absence of all proof, on the admission [*265] only, as against infants, should place the plaintiffs in a position to foreclose the infants' estate. He thought this should not be done. All that the Vice-Chancellor meant to decide in *Grane v. Mitchell* was, that, as the administrator had power to deal with or dispose of the leasehold premises, which were the subject of the mortgage, in the absence of the *cestuis que trust*, the circumstance that the *cestuis que trust* were parties to the suit did not deprive the administrator of his control over the property; and therefore the court might act upon the offer of the administrator to pay the debt, and direct the assignment thereupon to be made to him. A reference to the Master in this case would not bind the infants so as to be a foundation for foreclosure.

Motion refused with costs.

WESTCOTT v. CULLIFORD.

1844: 15th, 16th, 17th, and 20th January.

A testator devised his freehold estate to his widow, charged with a legacy to another, and also bequeathed to his widow his personal estate. The widow, by her will, gave a leasehold estate, part of the same property, (erroneously describing it as freehold,) to A., subject, in conjunction with the freehold premises, to the legacy; and she devised the freehold premises to B., subject, with the premises devised to A., to the payment of the same legacy:—*Held*, that the fact of the testatrix having given the estates to A. and B. respectively, in the mistaken supposition that both estates were, under the will of the original testator, subject to the legacy, but which he had charged on the freehold only, was no ground for exonerating the estate bequeathed to A., for there was no reason to presume that the testatrix would have apportioned her bounty differently if the mistake had not occurred.

Cases in which costs may be given to a plaintiff, out of an estate, notwithstanding the dismissal of the bill.

GEORGE WESTCOTT, by his will, dated in 1820, devised and bequeathed a freehold close, called Marsh-land, and all other his freehold estate, and all his personal estate, to his wife Betty, for

1844.—Westcott v. Culliford.

her life ;^{*} and after her decease, he devised Marsh-land, [*266] and all other his *freehold estate, to trustees and their heirs in trust for his daughter Elizabeth, and her issue ; and in case his daughter should die in the lifetime of his wife, without leaving any child, the testator directed that his trustees should stand seised of all his said freehold estate, in trust for his wife, her heirs and assigns, subject to a legacy of 600*l.*, which the testator thereby bequeathed to Thomas Allen, and directed to be paid out of his said freehold estate.

The testator died in 1821, and his will was proved by Betty, the widow, his executrix. Elizabeth, the daughter, died in 1825, unmarried, leaving the widow surviving.

Betty, the widow, by her will, dated in 1839, after giving some legacies, proceeded as follows :—“ I give and devise unto John Westcott, of [&c.,] all that my freehold tenements, lands, and hereditaments, called Beer's-barn, situate [&c.,] to hold the same unto the said John Westcott, his heirs and assigns for ever, subject, nevertheless, in conjunction with my freehold piece of Marsh-land, hereafter devised to Robert Culliford, his heirs and assigns, to the payment of the sum of 600*l.*, after my decease, given and bequeathed to my nephew Thomas Allen, by the last will and testament of my late husband George Westcott, deceased.” The testatrix then gave and devised unto John Westcott, certain other premises, and bequeathed to him her household goods and furniture, with certain exceptions ; and expressed her wish, that the said several hereditaments and premises, goods and furniture, should remain in the Westcott family, and not at any time thereafter be sold or disposed of. The testatrix then added :—“ I give and devise unto my friend Robert Culliford, of [&c.,] all that my close of Marsh-land, called the Sixteen

Acres, situate [&c.,] to hold the said last-mentioned he- [*267] reditaments unto the said Robert *Culliford, his heirs and assigns for ever, subject nevertheless to the payment of the said sum of 600*l.* unto the said Thomas Allen, in conjunction with the aforesaid hereditaments called Beer's-barn, hereinbefore given and devised unto the said John Westcott, his heirs and assigns.” And the testatrix devised and bequeathed all the rest, residue, and remainder of her messuages, lands, tenements,

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and hereditaments, and personal estate, unto the said Robert Culliford, his heirs, executors, administrators and assigns, subject to her debts and funeral and testamentary expenses, and certain legacies thereinbefore given; and she appointed Robert Culliford her sole executor.

The property described in the foregoing will as the freehold tenement called "Beer's-barn," had, as well as the "Marsh-land," been acquired by the testatrix under the said will of her husband. Beer's-barn was not, in fact, of freehold tenure, but was held for the residue of a term of 2000 years. The freehold property only was charged by the will of George Westcott with Allen's legacy.

Betty Westcott died in January, 1841. Robert Culliford, as her executor, came to the possession of the title-deeds of the whole property. A meeting of the persons interested in the estate took place; and Allen agreed to accept 600*l.* for principal and interest of his legacy, of which John Westcott (believing Beer's-barn to be freehold) agreed to pay 200*l.*, and Robert Culliford agreed to pay the other 400*l.* An agreement to this effect was made in writing, dated the 17th of April, 1841; and John Westcott paid the 200*l.* to Allen.

John Westcott, afterwards discovering that Beer's-barn, his part of the testatrix's estate, was leasehold, and therefore *not liable under George Westcott's will to bear any part [*268] of Allen's legacy, filed his bill against Robert Culliford, charging that the tenure of the property was known to the defendant when he made the agreement of the 17th of April, 1841, and praying that it might be declared fraudulent and void as between the plaintiff and Culliford, and, as between them, set aside; and that the plaintiff might be reimbursed, the said sum of 200*l.*, paid by him in pursuance of the agreement, or that the same might be charged, by way of mortgage, exclusively upon Marsh-land.

Mr. *Romilly* and Mr. *Kinglake*, for the plaintiff.

The testatrix has by her will given Beer's barn to the plaintiff, and Marsh-land to the defendant, subject only to the legacy

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charged thereupon by the will of her husband. It is clear, from misdescribing Beer's-barn as freehold, that the testatrix believed that part of the property to have been already charged with the legacy under the will of the original testator; and that she had no intention to create a new charge: the necessary result, therefore, is, that the plaintiff and defendant must take the portions of the estate respectively devised to them, subject to the charges created by the original testator, and no other. It follows that Allen's legacy must be paid wholly out of Marsh-land devised to the defendant. The rights of the parties under the will of the testatrix are not affected by that which is merely an erroneous recital: *Adams v. Adams*.(a)

Mr. *Roupell* and Mr. *Follett*, for the defendant.

The testatrix truly might have thought that Beer's-barn [*269] *was freehold, and therefore was charged with Allen's legacy; but, supposing that she had been informed of her mistake immediately after she had made her will, it by no means follows that she would have altered her will, or have given the plaintiff more, or the defendant less. The testatrix measured her bounty to each upon the supposition that each should bear his share of the charge: if she had been told that such would not be the effect of her will, the defendant may assume that she would have expressed more distinctly that such was her intention; or, if not, how is the plaintiff entitled to assume that she would then have expressed a contrary intention? The will under which both parties claim must be taken as it stands: the claim of the plaintiff to have his part of the estate exonerated rests upon a mere hypothesis without foundation.

The cases cited in *Adams v. Adams* were all referred to: also *Galton v. Hancock*,(b) *Serle v. St. Eloy*,(c) *Bickham v. Cruttwell*,(d) *Tait v. Lord Northwick*,(e) *Watson v. Brickwood*,(f) *Wythe v. Henniker*,(g) *Duke of Ancaster v. Mayer*,(h) *Robin-*

(a) 1 Hare, 537.

(b) 2 Atk. 430.

(c) 2 P. Wms. 386.

(d) 3 Myl. & Cr. 763.

(e) 4 Ves. 816.

(f) 9 Ves. 447.

(g) 2 Myl. & K. 635.

(h) 1 Bro. C. C. 454.

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son v. Bransby, (a) *Bootle v. Blundell*, (b) *Aldrich v. Cooper*. (c)
It is not necessary to state the arguments, or cases cited, on the question of setting aside the agreement.

The VICE-CHANCELLOR:—I have considered this case with much anxiety since the argument, and believe that satisfactory reasons might *be stated for a decision in favor [*270] of either the plaintiff or the defendant.

The principal question in the cause depends upon the construction of the will of Betty Westcott. During the argument, I suggested different ways in which the language of that will might be paraphrased for the purpose of trying the consequences, in point of construction, of the mistake, as to Beer's-barn, under which it is contended her will was made. But I think the safe way of reasoning upon the will is that which I am about to state. Upon the face of the will alone, the meaning of the testatrix is free from doubt or ambiguity. By her declared intention, John Westcott is to take Beer's-barn, subject, in conjunction with Marsh-land, to a legacy of 600*l.*, given to Thomas Allen by the will of George Westcott; and is also to take other freehold property, and certain specific chattels, the whole of which property is to remain in the family of Westcott. The defendant Culliford, by the like intention, is to take Marshland, subject, in conjunction, with Beer's-barn, to the same legacy. The defendant Culliford is also residuary legatee and executor.

Upon this will I observe, in passing, that I am bound to attribute to the testatrix a definite and deliberate intention to benefit the plaintiff and defendant respectively, her two specific devisees, in some ascertained proportions; and that such amount has been calculated upon the assumption that Beer's-barn, as well as Marsh-land, is to bear some proportion of the charge of 600*l.* I do not refer to this as being conclusive upon the question which has been argued, but for the purpose of enforcing the obligation I am under, to try with strictness an argument which, if successful, will disturb the rateable disposition of the testatrix's property made by her between the two specific devisees.

(a) 6 Madd. 348.

(b) 1 Mer. 193.

(c) 8 Ves. 392, 397.

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[*271] *The argument in the plaintiff's favor on the question of construction has arisen from the mis-statement in the will that Beer's-barn was freehold, whereas in fact it was of leasehold tenure. The plaintiff has argued that Betty Westcott must be taken to have known the title to the property she disposed of by her will; that her statement, that Beer's-barn was freehold, was equivalent to a statement that it was subject to the legacy of 600*l.*, by a title paramount to her will; and that she could not have intended herself to charge Beer's-barn with a legacy with which, from the very terms of her will, she must have supposed it to be already charged. The conclusion drawn from these premises was, that Betty had not by her will charged Beer's-barn with the legacy of 600*l.*, but had only spoken of it as being already subject to that charge; and that such an erroneous recital respecting the state of the property would not have the effect of creating a charge in the absence of any intention expressed in the will to create it. The case of *Adams v. Adams* was referred to on this point; and it was contended, that, inasmuch as Beer's-barn was not charged with the legacy by the will of Betty Westcott, the plaintiff was entitled to take it discharged therefrom.

If the will had contained the clauses respecting Beer's-barn and the other gifts to the plaintiff, and the Marsh-land estate had been left to descend to the heir of Betty, or had been given under a general residuary clause without mentioning the legacy, I should have felt strongly pressed with the plaintiff's argument. But if, on the other hand, the will had contained the clauses respecting the Marsh-land, and the other gifts to the defendant, and Beer's-barn had been simply devised as a freehold estate to the plaintiff, I should have had little, if any, hesitation

[*272] in refusing the relief which is *sought by this bill; although in that case the erroneous application of the word "freehold" to Beer's-barn would have let in the whole argument which has been urged on the part of the plaintiff. I should in that case have reasoned, as the court did in the cases of *Tilly v. Colyer*(*a*) and *Smith v. Maitland*,(*b*) that the inten-

(*a*) 3 Keb. 589.

(*b*) 1 Ves. jun. 362.

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tion of the testatrix to benefit each of two individuals was manifest upon the face of her will; that the amount in value and the precise manner to and in which each was to be benefited was unequivocally declared in the will in the clauses relating to Marsh-land, and in the other gifts to the defendant; that there was no rational ground for supposing the bounty intended for either legatee was dependent upon or affected by the mistake into which the testatrix appeared to have fallen; that the court could not speculate upon the alterations (if any) which she would have made in her will, if her attention had been called to the fact that Beer's-barn was not of freehold, but of leasehold tenure; (a) and that the court would therefore act upon the very words of the will, in the moral certainty that in so doing it was giving effect to the real as well as the declared intention of the testatrix, to divide the property between the specific devisees according to what she supposed to be the situation of that property.

The case, as it stands, is not that which either of the above hypothesis supposes; and the observations I have made upon the last hypothesis are, therefore, much weakened in their application to the actual case: for if the plaintiff's reasoning be right upon the clauses relating to Beer's-barn and the other gifts to the plaintiff, it is difficult to reject the argument that the construction to be put upon the other parts of the will, relating to *Marsh-land and the gifts to the defendant, [*273] must not be affected by the construction put upon the former clauses of the will. I do not, however, think that the circumstance last noticed displaces, however it may weaken, the force of the observations I have previously made. The clauses relating to the Marsh-land unequivocally declare an intention, (proceeding doubtless from mistake,) that Beer's-barn is, in favor of Marsh-land, to be treated as originally charged, in conjunction with Marsh-land, with the legacy; the intention of the testatrix so to determine the amount and character of the benefits conferred by herself on her two specific devisees is placed beyond the reach of argument, and the declaration respecting Marsh-land is the key to her real intention.

(a) See *Allan v. M'Pherson*, 5 Beav. 469: 1 Phill. 133, S. C.

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It is in this stage of the argument that I call in aid the observations I made at the outset as to the consequences of my acceding to the plaintiff's argument founded on that clause. In deciding this case in the defendant's favor, I do not in the slightest degree impugn the decision in *Adams v. Adams*, or the cases upon which I founded that decision. In that case, I refused relief to the widow, because I could not find in the will any expression of intention to confer any benefit upon her by the will itself. I decide this case in the defendant's favor upon the express ground that I do find the intention of the testatrix unequivocally declared in that part of her will which relates to Marsh-land, and that there is no rational ground for believing that her intention, as between the plaintiff and defendant, could have been influenced by the mistake imputed to her. I think effect must be given to the will of Betty Westcott, as if the charge upon Beer's-barn had been actually found in the will of George, which her will supposes it to have been.

*274] *The bill must be dismissed, but without costs. If the agreement of the 17th of April had not been made, and the bill had been so framed as to admit of my doing it, the costs of the suit would have come out of the estate. I should, perhaps, even before the agreement have found it impossible, according to the case, to give the plaintiff the costs of the bill dismissed; but, certainly, the circumstances attending the execution of that agreement are such as to deprive the defendant of all pretence for asking me to alter the right of the plaintiff by reason of that agreement having been executed.

At the request of the counsel for the plaintiff, suggesting that the will of the testatrix had created the difficulty, the cause was allowed to be mentioned again on the point of costs,—his Honor observing that it was a case in which costs ought to be given out of the estate, if any authority could be found for it.

February 15th.—Mr. Romilly mentioned *Lynn v. Beaver*,(e) *Ashe v. Berry*,(b) *Thomason v. Moses*,(c) and observed, that di-

(a) T & R. 69.

(b) 3 Moll. 97.

(c) 5 Beav. 77.

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recting the costs to be paid out of the assets of the testatrix would not be inconsistent with a declaration of the true construction of the will.

The VICE-CHANCELLOR said that it appeared to him the costs could not be given in this case. The court was not administering any fund, and, if the costs were given, it must be by a decree personally against the party; it did not appear that there was any precedent *for that course. The ju- [*275] risdiction of the court to give the plaintiff his costs when the bill was dismissed had been doubted.(a) Lord Langdale, in *Thomason v. Moses*, thought that the court had jurisdiction to give costs, notwithstanding the dismissal of the bill, where it had a fund to administer, and the case was one in which the opinion of the court on the question in the cause was necessary to be taken before the executors could properly administer the estate. He had been informed by Lord Langdale, that Sir John Leach had laid down that principle, and the rule, if cautiously applied, seemed right. It was, however, a rule to be applied with caution; for, in cases where executors could not safely administer the fund without the declaration of the court, a number of bills might be filed by different legatees, requiring the decision of the court as to the validity of their several claims; and if, although their claims should be disallowed, they were all to be paid their costs of the different suits, it might lead to injurious consequences. In *Thomason v. Moses* there was only one question for the determination of the court; and the estate could not therefore be prejudiced by that mode of disposing of it. The present case, moreover, was the case of a legal devise; the devisee might have taken possession, and left the legatee to assert his claim as he could; and the bill was filed in this court to set aside the agreement, on the ground of fraud.

Bill dismissed without costs.

(a) See *Cranch v. Brisset*, 5 Ves. 398; *Wykham v. Wykham*, 18 Ves. 423; *Lewis v. Loxham*, 3 Mer. 430; *Springfield v. Ollett*, Id., n.; *Broughton v. Lashmeer*, cited 1 Y. & C. C. C. 11; and *Hay v. Bowen*, 5 Beav. 615.

1843.—Humphries v. Horne.

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*HUMPHRIES v. HORNE.

1843: December 18. 1844: January 20, 23.

A purchaser, complaining that his conveyance did not comprise the whole of the property which he had contracted for, filed his bill for a conveyance of the remainder, and obtained an injunction restraining the vendor from suing him for the purchase-money, part of which was afterwards ordered to be paid into court to abide the event of the suit. The bill was dismissed:—*Held*, that the vendor was entitled to the residue of the purchase-money, and the interest upon it, to the time of payment, although the purchase-money in court had not been laid out, and no interest therefore had accrued thereon.

Evidence on which the court might decree the specific performance of an alleged agreement, according to one construction of a writing which was of doubtful meaning, where a conveyance, according to a different construction, had been executed by the vendor, and accepted by the purchaser.

THE defendant was a devisee in trust for sale of certain parcels of land, and of the great tithes payable in respect of some of those parcels. In advertising the lands for sale by auction, some of the parcels, including Lot 9, were described in the public announcement and conditions of sale, as free from great tithes. Lot 9 was not sold at the sale, and the plaintiff afterwards entered into a contract in writing for the purchase of it: the contract referred to the conditions of sale, but did not mention the tithes. The conveyance of the land specified in the contract was prepared by the plaintiff's solicitor and executed. The plaintiff's solicitor afterwards discovered, that, in the conveyances of the parcels of the land to other purchasers, the tithes were included; and the plaintiff thereupon called for a conveyance of the tithes on Lot 9. This being refused, the plaintiff filed his bill for specific performance; upon which he obtained the common injunction, restraining the defendant from suing out execution upon a judgment he had recovered for the purchase-money, amounting to 1339*l.*, and costs. On putting in his answer, the defendant moved to dissolve the injunction; and an order was then made that the plaintiff should pay 1000*l.* and interest to the defendant, and the remainder of the purchase-money and interest into court, and that the latter should be invested,—the injunction,

1843.—*Humphries v. Horne.*

upon such payments, to be continued. The plaintiff, accordingly, paid 1036*l.* 12*s.* to the defendant, and 337*l.* 2*s.* into court.

On the hearing of the cause, Mr. *Kenyon Parker* and Mr. *Glasse* having been heard for the plaintiff, and Mr. *Teed* and Mr. *Faber* for the defendant,

*1843: *Dec. 18th.*—The VICE-CHANCELLOR stated [*277] the points in the cause, and the principles of law applicable to them, in the following words:—

The plaintiff says, that, according to the truth of the case, the tithes were contracted for, and were intended to have been included in the contract: he insists, moreover, that they are constructively so included. The defendant, on the other hand, insists that the tithes are not upon any construction included in the contract; or, if they are, that they are improperly so included.

The purchaser, immediately after the agreement, and before the conveyance, is entitled to have everthing which the agreement, strictly interpreted, gives him. And if a conveyance be executed for the purpose of giving effect to and executing the agreement, and that conveyance, by fraud, accident, or mistake, should give the purchaser less than the agreement entitled to, him I have no doubt that he may effectually call upon this court to rectify the defective conveyance, and give him all that the agreement comprehended. Again, if the writing which purports to be the agreement of the parties is so expressed as to give the purchaser more than the actual agreement between the parties would entitle him to, it is perfectly clear that the vendor may show what the real agreement was, by way of defence to a bill by the purchaser seeking the specific performance of the subject of the inaccurately-expressed writing: *Marquis Townshend v. Stangroom*,^(a) *Clowes v. Higginson*.^(b) It must be admitted that the defendant who sets up such a defence undertakes a task of difficulty; but that difficulty is diminished where the meaning of the writing is itself in any respect doubtful; and it is

(a) 6 *Ven.* 328.

(b) 1 *V. & B.* 524.

1844.—*Philips v. Philips*.

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***PHILIPS v. PHILIPS.**

1844: January, 19th, 20th, and 26th; May 6th, and 23rd.

The testator gave the residue of his estate to trustees, upon trust, to divide the same amongst the several persons who were his creditors at the time he executed a certain conveyance for their benefit, their executors and administrators; such payment and provision to be made to and amongst such persons respectively, their respective executors or administrators, rateably and in proportion to the quantum or amount of the original debt or debts due from him to such person or persons respectively: and if any person or persons claiming under such bequest should not give notice of such claim to the trustees within two years of the testator's decease, such share or shares of the residue to go to certain residuary legatees:—*Held*, that the residue was to be divided into parts corresponding in number and proportion with the original debts.

That the shares attributed to the debts of creditors who died in the lifetime of the testator did not lapse by their death.

That the surviving partners were the persons to receive and give receipts for the share of the residue attributed to a joint debt, and that it was not necessary, before carrying over the shares in this suit, to inquire into the state of the accounts as between the surviving and the representatives of the deceased partners.

That a claim made by the representatives of a partner beneficially interested in a joint debt was a sufficient claim, although such partner was not the last survivor of the partners in the firm to which the debt was owing.

That the share of the residue attributed to a debt, in respect of which no claim was made, belonged to the residuary legatees.

That the amount of the residue, whether as exceeding or falling short of the amount of the unpaid debts, did not affect the construction of the will.

Semble, that the trust must be considered as proceeding upon a mixed principle of bounty and obligation; and that the will must be read as, to some extent, directing payment of debts.

Quære, as to the construction of such a bequest, if the debts had all been paid in full before the date of the will.

Different construction of a bequest to persons who had been creditors, but had been paid in full, where the payment had been made before, and where after, the date of the will.

If creditors who were paid their debts in full, before the date of the will, were on that ground excluded, the shares of the residue otherwise attributable to their debts would go to the other creditors, and not to the residuary legatees.

The legal effect of acknowledging a debt barred by the Statute of Limitations is that of a promise to pay the old debt, which promise the law implies from the acknowledgment, and for which the old debt is a consideration in law; but, if the promise is limited to payment of the old debt in a certain time, or in a particular manner, or out of a specific fund, the creditor can claim nothing more than the promise gives him, for the old debt is revived no further than as a consideration for the new promise.

1844—*Philips v. Philips*.

After several references to the Master, and after the cause had been argued and judgment given on further directions, the court refused to stay the distribution of the fund, and direct a further reference with respect to a new case as against certain creditors, which case it did not appear that the parties might not have previously brought forward, and which was not proved by the evidence adduced.

Whether the right of a creditor to a share of the residue would not be sustained, if the principal of his debt had been paid, but he had not received interest upon the debt for the time that the payment was delayed—*quære*?

NATHANIEL PHILIPS, by his will, dated in March, 1828, disposed of the residue of his estate as follows:—I give and bequeath all my personal estate whatsoever, not hereinbefore specifically disposed of, unto John Burton Philips, Nathaniel Philips, Robert Philips, and Mark Philips, their heirs and assigns, upon trust, with all convenient speed after my decease, to convert the same into money, or such part thereof as shall not consist of money; and I declare and direct that the said John Burton Philips, Nathaniel Philips, Robert Philips, and Mark Philips, their executors and administrators, shall stand possessed and interested of and in the monies which shall arise from my said residuary personal estate, upon [*282] trust, to pay and divide the ultimate residue or surplus of the said trust monies unto and amongst the several persons who were my creditors at the time I made and executed a conveyance of my estate and effects for their general benefit, in or about the month of October, 1802, their respective executors and administrators, such payment and provision to be made to and amongst such persons respectively, their respective executors or administrators, rateably and in proportion to the quantum or amount of the original debt or debts which was or were, at the time I made and executed such conveyance and assignment as aforesaid, due and owing from me to such person or persons respectively, excepting out of such calculation, payment, and division the debt due to my late brother William Philips, or his administrators. Provided nevertheless, and I do hereby declare and direct, that, if any person or persons claiming to be entitled to any share or shares of the said residuary trust monies, under and by virtue of this my will, shall not cause notice in writing of such claim to be given to the trustee or trustees for the time being of this my will, or to some or one of such trustees, within

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two years next after my decease, then and in such case my will is, that such last-mentioned share or shares of the said residuary trust monies shall go to and be in trust for the said John Burton Philips, Nathaniel Philips, Robert Philips, and Mark Philips, in equal shares and proportions, their respective executors, administrators, and assigns." And the testator declared, that the acts of any one or two of the trustees for the time being should be as valid and effectual in the execution of the trusts, as if all the trustees had joined or concurred in such acts; and he recommended his trustees to consult certain persons therein named, in any matter in which their advice and information [*283] might be *likely to prove useful or material, and he appointed the said trustees executors of his will.

The testator died in America, in October, 1836. Robert and Mark, two of the executors, proved the will; and the bill was filed by them against John Burton and Nathaniel, the other two residuary legatees, for the administration of the estate under the direction of the court. At the hearing in May, 1838, various inquiries were ordered; and on the hearing for further directions in August, 1841, and on a further hearing in December, 1842, other inquiries were directed.

Upon the several reports of the Master the following facts appeared:—By a deed, dated the 31st of January, 1801,^(a) made between the testator of the one part, and G. W. Thelluson, C. Marriott, G. Philips, W. Cramond, James Philips, and J. Hanson, of the other part, reciting, that the testator then was and stood justly indebted to sundry creditors in divers sums of money, which by reason of losses and other misfortunes, he could not fully pay, and that, being willing to pay the same so far as his stock and effects would extend, he proposed and agreed to make an absolute assignment of the same unto and amongst his said creditors as thereafter mentioned,—and the testator, to the end aforesaid, thereby granted, bargained, sold, assigned, and transferred unto the said parties thereto of the second part, all the goods, stock in trade, debts, monies, and effects belonging or

(a) This deed the court declared to be that referred to in the will, as of the date of October, 1802.

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owing to him, the testator, upon trust to sell and dispose of the same, and to retain, pay, apply, and dispose, as well of the monies arising from such sale or sales, as also of all the said thereby-assigned debts, when and as the same *should [*284] be by them got in and received, to and among all the creditors of the said testator in proportion to their respective debts, so far as the same should extend, deducting, in the first place, the necessary expenses attending the execution of the trust.

The debts owing by the testator, (excepting that to his brother William Philips,) and the persons to whom the same were due at the time of the execution of the foregoing deed, are stated in the following table, which shows, also, the persons to whom the Master found that the same debts were respectively due at the time of making his report.

<i>Debts.</i>	<i>Amount of Debts.</i>			<i>To whom due at the Date of the Deed.</i>	<i>To whom due, or by whom claims made under the Will.</i>
	£	s.	d.		
1.	11,893	15	6	Philips, Cramond, & Co.	Sir George Philips and Robert Philips the elder, as the surviving partners of Thomas Philips & Co.
2.	1076	1	4	Thomas Philips & Co. -	Sir George Philips and Robert Philips the elder, as afore-said.
3.	284	15	6	Berckemeyer & Co. -	Dredrick Hinrich Girdirkins, the lawful attorney of Cecilia Berckemeyer, widow, the relict of Bernhard Philipp Berckemeyer, deceased.
4.	26,517	19	5	{ Thelluson, Brothers } & Co. - - }	Notice of claim given by N. & G. Hibbert.
5.	2839	17	9	Samuel Philips & Co. -	The plaintiffs and defendants, as executors of Samuel Philips, deceased.
6.	3311	13	4	Charles Wood & Co. -	Sir George Philips and Robert Philips, the elder, and Charles Wood and Richard Wood, as surviving partners.
7.	1334	12	0	Peter Nairac, - -	(No notice given, or claim made, under the will.)

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[*285] *Notices of claim were given respect of the first six of the above debts. The fourth debt (Thelluson, Brothers & Co.) was owing to a firm or partnership composed of several members, all of whom died in the lifetime of the testator; the third debt was owing to a nominal partnership, which, in fact consisted of a single individual, who also died in the lifetime of the testator; and the other debts were owing to firms or partnerships, some of whose members were dead at the time of the testator, and some of whom survived him. The claims were made by the surviving partners of the creditors, where there were any such living, and by the representatives of the deceased creditor in respect of the third debt. It appeared, or was admitted, that some dividends had been paid in the testator's lifetime by the trustees appointed by the deed of 1801, upon the debts in respect of which the above claims were made; but it did not distinctly appear how much had been so paid, nor did it appear that such dividends had, in any case, exceeded six shillings in the pound in the whole. The Master reported that the usual advertisements as to debts had been published, but no general creditor of the testator had made any claim. The amount of the residue was found to be about 13,000*l*.

The cause coming on for further directions,

Mr. *Roupell* and Mr. *Rolt*, for the plaintiffs.

Mr. *Romilly* and Mr. *Busk*, for the defendants.

Mr. *Russell*, Mr. *Koe*, Mr. *James Parker*, Mr. *Wood*, Mr. *Mylne*, and Mr. *Philips*, for the different classes of creditors, not parties to the suit.

[*286] *The principal points discussed were, whether the trust created by the will for the creditors of the testator named in the deed of 1801 was to be regarded as the recognition of certain existing debts, and a provision for their discharge *pro tanto*; or, whether the trust was to be considered as mere bounty. The argument was directed to the consequences of adopting either principle:—first, of treating the trust as in any sense

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a revival of the debts, whereby the creditors or their representatives could have rights of participation independently of the creditors surviving the testator, or even independently of the trusts of the will; or, secondly, regarding the trust as giving legacies to the persons indicated by the reference to the deed of 1801, subject, in each case, more or less, to the incidents of a legacy; as to lapse, where the legatees or any of them, whether joint or several, died in the lifetime of the testator; and in such cases raising the question, whether the gift to the creditors, "their executors and administrators," operated as a substitution of the personal representatives, so as to prevent a lapse by the death of the legatee.

The cases cited were: *Coppin v. Coppin*,^(a) *Williamson v. Naylor*,^(b) on the character of the disposition made by the will; and *Gittings v. M'Dermott*,^(c) *Tidwell v. Ariel*,^(d) *Cotton v. Cotton*,^(e) *Knight v. Gould*,^(f) *Evans v. Charles*,^(g) *Sibley v. Cook*,^(h) *Sibthorpe v. Moxom*,⁽ⁱ⁾ *Lashbrook v. Cock*,^(k) on the point of substitution of the representatives of the creditors for creditors themselves, and on the construction of the trusts of the will, whether regarded as the fulfilment of [*287] an obligation, or as pure bounty.

It was urged, on the part of the plaintiffs and defendants, that the case was distinguished from that of *Williamson v. Naylor* by the absence of the direction to apply the fund "to the immediate payment and discharge of all" the testator's lawful debts, which appeared in that case. And, as authorities showing that the cause was ripe for the distribution of the fund, to the exclusion of all creditors who had not properly claimed under the will, whether they had received notice or not. *Tollner v. Marriott*,^(l) *Hawkes v. Baldwin*,^(m) *Burgess v. Robinson*,⁽ⁿ⁾ *Chauncy v. Graydon*^(o) were referred to.

VICE-CHANCELLOR:—I have no doubt as to the decision to

(a) 2 P. Wms. 291.

(d) 3 Madd. 403.

(g) 1 Anstr. 128.

(k) 2 Mer. 70.

(n) 3 Mer. 7.

(b) 3 Y. & Coll. 208.

(e) 2 Beavan, 67.

(h) 3 Atk. 572.

(l) 4 Sim. 19.

(o) 2 Atk. 616.

(c) 2 Myl. & K. 69.

(f) 2 Myl. & K. 295.

(i) Id. 580.

(m) 9 Sim. 355.

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which I ought to come, except upon one point. I assume, at present, that all the persons who were creditors at the time of executing the deed of 1801 are ascertained persons; that Neirac, of whom nothing more is now known, was one of those persons, and that he must be excluded from any benefit under the will. The debts (including that of Neirac) were seven. The proper mode of administration is, to divide the residue into seven parts corresponding with those debts. The share appropriated, in this division, in respect of the debt of Neirac, will belong to the residuary legatees, for I see no ground for making any further inquiry with regard to that debt.

Confining the question then to the six other debts, you [*288] have next to consider the language of the testator, "where he says that the residue is to be divided among the several persons who were his creditors at the time he executed the deed referred to, "their respective executors and administrators." These words certainly give room for the argument that you cannot have, strictly speaking, the respective executors and administrators of several persons who were joint creditors; but it is clear that in that deed the testator had provided for the payment of each debt to the person or persons, as the case might be, to whom the same was due; and, in order to make his meaning plain, the testator goes on to direct, that the payment under his will is to be made according to the quantum or amount of the original debt or debts which was or were, at the time of the assignment, due and owing from him to such creditors respectively, putting it beyond a doubt that he attributes a debt to one person, where a single person was creditor, or, to more persons than one, where there were joint creditors. I have no doubt that is the true construction of the will, and it appears to me to be decisive with regard to the claims of those firms any of the members of which are now living. It excludes the necessity of any inquiry, and I certainly think no inquiry is necessary with regard to the state of the dependencies between the continuing members of a firm and the executors of deceased members of that firm. The testator was debtor to several individuals jointly, owing one debt to the members of a firm: being so indebted to them he has given them a sum of money, which, whether a

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debt or a bounty, was clearly given to them jointly. Some of the joint creditors have died. The representatives of deceased partners may be entitled to an account from the survivors; but, according to the practice of the court, it is enough to make the survivors, as the persons *prima facie* entitled, parties to suits relating to the joint estate, without making parties in a cause the representatives of *all the deceased partners. [*289] The case of partners retiring, but being still alive, is different, for that may only sever the interest in the partnership in respect of future transactions; in respect of previous transactions they may remain partners as before. In the case of death of a partner, the persons competent to give receipts in respect of joint debts, are, no doubt, the surviving members of the firm.

The claims in respect of the debts in those cases where the creditors to whom they were owing, whether joint or sole, had all died before the testator, lead to considerations of much difficulty. On this point I shall at present say no more than that it is, at least, very improbable that the testator should have intended to make the benefit to his individual creditors contingent upon their severally outliving himself; or that he intended joint creditors, from having the chance of more lives, to be in a better position than sole creditors.

Jan. 26th.—VICE-CHANCELLOR:—At the conclusion of the argument, I decided that the residue must be divided into as many parts as there were debts, attributing to each debt a share of the residue proportioned to the amount of the original debt; that Neirac's share would go to the residuary legatees, the parties in the cause; that, whether the residue given to the creditors was to be considered a legacy independent of the original debt, or payment of that debt, the surviving members of a firm who were originally creditors were entitled to the shares of the residue to be attributed to those debts respectively; and I reserved my judgment only upon those cases in which the debt was originally due to persons, all of whom had died in the testator's lifetime.

*No claim was made by the other creditors to the share [*290] of the residue to be attributed to Neirac's debt; and the

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only point submitted to me in respect to that debt was, whether further inquiry was necessary as to Neirac, or those who might claim under him, and I was of opinion that no inquiry need be gone into. No persons have claimed to be general creditors of the testator. The case is, therefore, reduced entirely to the question as to the remaining creditors under the deed.

If this case had come before me without any other guide than the decision in *Coppin v. Coppin*,^(a) I might possibly have concluded that the intention of the testator to give a limited interest only, in his estate, to creditors whose debts were barred by the Statute of Limitations, and the gift of that interest in the form of a share of unascertained residue, required me to decide the present question in accordance with that case. But, looking to the points of resemblance between the present case and *Williamson v. Naylor*,^(b) and the high authority of that case,—which was decided at the hearing by the Lord Chancellor, and approved of by Mr. Baron Alderson, upon further directions,—I could not form my judgment upon the case now before me without a careful comparison of the points in question with those which occurred in *Williamson v. Naylor*.

In that case, as in this, the debts were barred by the Statute of Limitations at the time the will was made. In both cases the will was made before the passing of Lord Tenterden's act, and, therefore, before the question had arisen, whether, in the case of a debt barred by the Statute of Limitations, the remedy only, or the right as well as the remedy, was lost to the creditor. In that *case a portion,—one-fifth of the residuary estate,—in this, the whole residuary estate, is given to specified creditors, without reference to the question, whether the estate so given shall be more or less than the amount of the debt. To that case, as to this, the observation, if well-founded, would have applied, that, if the effect of the will was to revive the old debts, by removing the bar which the statute interposed, that might enable the creditors, in direct opposition to the trusts of the will, to claim that part of the residue which the testator had, in terms, excluded from the claims of creditors, and given to

(a) 2 P. Wms. 296.

(b) 3 Y. & Coll. 203.

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others. In other words, the creditors, if their debts were revived, might possibly claim payment of their debts paramount to the trusts of the will. In both cases the direction is to pay and divide a specified fund (which, in one case absolutely, and in the other conditionally, withdrew part of the estate of the testator from the claims of the creditors) between such creditors in proportion to the amount of their debts. In both cases the question arose, whether the interest of a creditor who died in the testator's lifetime would lapse. In both cases the original debt is acknowledged. In *Williamson v. Naylor* Lord Lyndhurst says, "The debts were subsisting debts at the time when the will was made, and when the testator directed this portion of his residuary estate to be divided amongst his creditors in proportion to the amount of their original debts." He then adds, "I cannot consider this as a mere voluntary bounty on the part of the testator, but I must consider that the testator meant this money to be applied in satisfaction of an obligation,—in reduction of those debts which, although they could not be enforced against him at law, were nevertheless subsisting debts." He then observes, that in *Coppin v. Coppin* the debt was extinguished by composition and release; whereas, in the case before him, there was no release or extinguishment of the debts, *nor any [*292] obstacle to the recovery of them except the bar to the remedy raised by the statute, which bar the testator had removed. Now, if the observations of the Lord Chancellor which I have quoted from the judgment in *Williamson v. Naylor* as to the debts being still subsisting apply to this cause, the resemblance between the two cases is so close, that an attempt to distinguish them could only be explained by a desire on my part to escape from the authority of that decision, which I certainly do not express or intimate. The question then is, do these observations apply to the present case?

The legal way of stating this question is, whether this will, properly construed, acknowledges the existence of the debts referred to (in whole or in part) at the time the will was made. The question is, not whether that acknowledgment is, in this case, as plain and explicit as it was in *Williamson v. Naylor*, but whether the will does or does not contain such an acknow-

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ledgment. In considering this, I am of opinion, that the circumstance that the gift is of a residue, which might be more or less than the amount of the unpaid debts, ought not to have any influence on the point. If the testator, calculating his residue at the time of making his will, knew what his property was at the time of his death, he knew (as the fact was) that his residue was less than the amount of the debts as they stood at the date of the will. If he supposed the residue could or might exceed the amount of the debts, and still intended the will to operate, he may have considered the excess equivalent only to the loss of interest and the inconvenience and delay which his creditors had sustained. The case of *Williamson v. Naylor* and this case are not distinguishable in this particular.

Then, with respect to the rest of the case,—the testator [*293] acknowledges the existence of the original debts:

he does not suggest (nor is it suggested as a fact) that the debts had been extinguished at the date of the will; and in this case, as in *Williamson v. Naylor*, he directs his trustees to pay and divide an indefinite residue amongst the creditors rateably, and in proportion to the amount of their original debts. This alone I should have thought sufficient. But, to remove all doubt upon the construction, he excepts out of the debts to which the previous direction applies a debt owing—(this is the effect of the exception)—a debt due to the administrators of his late brother William; an exception which was useless, unless a debt owing to a deceased creditor was within the directing clause. The exception showing (to use the expression of Mr. Baron Alderson in *Williamson v. Naylor*) that “debts and not persons were in the contemplation of the testator.” But it is not, I think, necessary to rely upon any inference which may be derived from this exception. In coming to the conclusion that the representatives of the creditors who died in the testator’s lifetime are entitled to claim, I consider that I follow the case of *Williamson v. Naylor*, that I am giving effect to the trusts of the will, and that I am doing that which the conscience of the testator led him to do,—discharging *pro tanto* his obligations to his creditors, notwithstanding the bar of the statute. If that were his intention, which, on the face of the will, and on the authority

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of *Williamson v. Naylor*, I will assume, I cannot suppose that the testator contemplated depriving of the benefit given by the will those creditors who might happen to die between the date of his will and his death.

It was said, however, at the conclusion of the argument, that since the date of the will the debts, in point of fact, had been fully paid and satisfied. This point is *not sug- [*294] gested on the pleadings, nor is any such fact regularly before me. If any circumstance of this kind exists which the parties think material, I will not allow the order to be drawn up until they have had an opportunity of presenting a petition with reference to it.

Two petitions were presented by the plaintiffs: one of such petitions stated that the last survivor of the partners in the house of Thelluson, Brothers & Co. (the creditors in respect to the fourth debt in the above list) was William Mitchell, who died, in 1834; and that no notice of claim under the will in respect of such debt had been given by any person except by H. and G. Hibbert, the representatives of George Woodford Thelluson, another of the partners of the said firm, who died in 1811. The same petition stated that the sums of 1076*l.* 1*s.* 4*d.*, 2839*l.* 17*s.* 9*d.*, and part (viz. 2141*l.* 13*s.* 4*d.*) of the sum of 3311*l.* 13*s.* 4*d.*, being the second, fifth, and sixth of the said debts, had accrued due in respect of joint adventures by the testator and another, and had been paid in full to the respective creditors, partly by dividends under the trust deed, in the years 1805 and 1809, and the remainder in or shortly after the year 1809. And the petition prayed that the shares of the residue apportioned to the said second, fourth, and fifth debts, and part of the sixth, might be transferred to the residuary legatees for their own benefit.

The other petition was presented by the plaintiffs, in their capacities as executors of some of the creditors under the deed; it set forth the shares of the several partners in the firms of Philips, Crumond & Co., Thomas Philips & Co., and Charles Wood & Co., (the creditors *in respect of the said first, second, [*295] and fifth debts,) and stated the death of Robert Philips the elder, since the master's report, finding him to be one of the

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parties to whom such debts were then due : that the plaintiffs had become the personal representatives of Robert Phillips the elder, and of others of the said deceased creditors ; and the petition prayed, that the plaintiffs, in their characters as representing such creditors, might be allowed to come in and be bound by the proceedings in the cause ; and that, if the share of the residue attributed to the first debt (Phillips, Cramond & Co.) should be paid to Sir George Phillips, the now sole surviving partner, he might be declared a trustee for the petitioners as to the shares thereof of the deceased partners in that firm whom the petitioners represented ; and that, if the share of the residue attributed to the second debt (Thomas Phillips & Co.) should be paid to the said Sir George Phillips, as the now sole surviving partner, he might also be declared a trustee for the petitioners as to the shares thereof of the deceased partners represented by the petitioners ; and that, if the share of the residue attributed to the sixth debt (Charles Wood & Co.) should be paid to the said now surviving partners, they might be declared trustees thereof for the petitioners, as to the shares of the deceased partners represented by such petitioners.

Both of the petitions were set down to be heard with the cause for further directions.

Mr. *Roupell* and Mr. *Rolt*, for the plaintiffs, and Mr. *Romilly* and Mr. *Busk*, for the defendants, in support of the first petition, argued, first, that the claim made by the representatives of a partner in the house of Thelluson, Brothers & Co., who neither survived the testator, *nor was the last survivor [*296] of the partners in the firm, was not a sufficient claim to entitle the creditors in respect of the fourth debt to the benefit of the residuary bequest. If a claim by a party not entitled to payment would suffice, any stranger might have made a sufficient claim. Secondly, that the second and fifth debts, and part of the sixth, having been paid in full, the creditors, in respect of such paid debts, had no interest in the residuary gift : that assuming the will to be bounty, and not payment of debt, yet it must be taken to be bounty to the representatives of persons to whom debts of some amount were owing ; the extent of the

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bounty must be measured by the extent of the debt, and where the debt was satisfied, the bounty did not attach. The character of unsatisfied creditor was part of the description of the person who was to take the legacy ; although the testator had regulated the amount of the legacy to the persons sustaining that character according to the amount of their original debts, and not according to the amount of their present unsatisfied claims.

Mr. *Russell* and Mr. *James Parker*, for the representatives of *Thelluson, Brothers & Co.*, insisted that the claim by a party beneficially interested in the debt in respect of which it was made was a sufficient claim under the words of the will, notwithstanding the claimants did not represent the last surviving partner of the joint creditors.

Mr. *Koe* Mr. *Wood*, and Mr. *Philips*, for Sir George Philips and others, claiming the whole or part of the first, second, fifth, and sixth debts contended, that, as the testator had measured his bounty by the original debts, without reference to the sums which the creditors had severally received, there was no ground to infer that the *fact of 20s. in the pound [*297] having been paid to any creditor, was to exclude his claim to participate in the residue : the testator might still have considered the delay in payment and the loss of interest as entitling the creditors to his consideration : the payment was, in fact, made long before the date of the will, and there was no reason to suppose that the testator was ignorant of it. He had, therefore, deliberately included the satisfied creditors amongst the objects of his bounty.

Mr. *Mylne*, for the representatives of the deceased partners, who were joint creditors, supported the second petition.

May 23d.—VICE-CHANCELLOR.—After the decision upon the questions which were raised on the former argument of this case, I allowed the further directions to stand over, with liberty to present a petition for the purpose of raising another point not then before me, founded upon the suggestion that some of the

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debts had been ultimately paid in full, at a time not mentioned, but which I understood to have been since the date of the will. It appeared, also, that a point was intended to be made, and not, as I had supposed, conceded,—that the claim in respect of *Thelluson's* debt could not be sustained, attending to the fact that the only claim made to that debt within the two years given by the will was not made by the personal representative of the last survivor of the partners in *Thelluson's* firm, but by the personal representative of a partner who died, leaving other members of the firm surviving him; and I therefore reserved the consideration of that point also.

[*298] *A petition has since been presented by the plaintiffs, stating, that 20s. in the pound had been paid upon some of the debts, not, however, (as I had understood,) since, but before the date of the will, and praying that the residuary legatees might have the benefit of the sums to be attributed under the will to the particular debts so alleged to have been paid; not seeking to affect my judgment as to the other debts on that account. This illustrates the inconvenience of permitting a case to be brought forward piecemeal. Had I understood that the debts to which I now refer had been paid in full at the date of the will, I certainly should have given no opinion upon the construction of the will until the whole case was before me. The payment of any debt after the date of the will could have no effect upon its construction; but it might be otherwise of a debt paid before. If all the debts due in 1801 had been paid at the date of the will, *Coppin v. Coppin*, and not *Williamson v. Naylor*, would have been the authority I should, probably, have relied upon; and, although the circumstance that some and not all the debts were paid at the date of the will may not be of equal force, it is impossible to deny that the construction of the will might be affected by that circumstance. Now, the plaintiffs, by the course they have taken, place the court in considerable difficulty. I have been allowed to decide the case as to all the debts, except those now alleged to have been paid, upon the assumption that I had before me all the material facts. The plaintiffs, indeed, by this very petition, admit that my decision as to debts not paid at the date of the will is right, whether the

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creditors survived the testator or not. They admit that the will in this cause is to be read, to some extent, at least, as directing payment of debts, and not as giving legacies merely.

For, if the will is to be read as giving legacies, *it is [*299] difficult to understand how the creditors who died in the lifetime of the testator can avoid the consequence of a lapse; and if the will is to be read as directing payment of debts, it is at least doubtful, whether I must not read it as excepting those persons (if any) who, having been creditors in 1801, had ceased to be so at the date of the will. In that case the residue would go to the other persons who were creditors in 1801, and whose debts were not alleged to have been satisfied, and which persons do not make any such case against the creditors now said to have been paid as is made by the plaintiffs; on the contrary, they, by their counsel, have admitted the concurrent claims of the creditors so alleged to have been paid.

As my judgment in this case has proceeded, and will now proceed upon *Williamson v. Naylor*, and as it is desirable that the parties should not be misled by any observations which have been made, or omitted to be made, respecting that case, I shall again recur to it. One of the difficulties of that case was supposed to be, that, if the will revived the debts, the whole of the estate of the testator must have become liable to the debts, and not that limited portion only which the testator had devoted to them; and, for this, the observations of Baron Alderson, during the arguments of counsel, were referred to.^(a) I am indebted to that learned judge for the observation, that it is not strictly accurate to say, that the effect of acknowledging a debt barred by the statute of limitations is to revive it for all purposes. The legal effect of an acknowledgment of a debt barred by the statute of limitations is that of a promise to pay the old debt, and for this purpose the old debt is a consideration in law. In that sense, and for that purpose, the old [*300] debt may be said to be revived. It is revived as a consideration for a new promise. But the new promise, and not the old debt, is the measure of the creditor's right. If a debtor

(a) See 3 Y. & Coll. 213.

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simply acknowledges an old debt, the law implies from that simple acknowledgment a promise to pay it; for which promise the old debt is a sufficient consideration.[1] But, if the debtor

[1] In New York, and in some other States, the rule is different. A bare acknowledgment of the debt is not sufficient to take it out of the statute: there must be a promise, a new contract,—though founded on the original consideration,—to take a case out of the statute. If the promise is not express, the case must be such that it can be fairly implied. There must, at least, be a plain admission that the debt is due, and that the party is willing to pay it. *Allen v. Webster*, 15 Wend. 284; *Stafford v. Richardson*, 15 Wend. 302. See, also: *Van Keuren v. Parmelee*, 2 Comstock, 531; *Bell v. Morrison*, 1 Peters, 362; *Rosevelt v. Mark*, 6 John. Ch. Rep. 290; *Sands v. Gelston*, 15 John. R. 511; *Bradley v. Field*, 3 Wend. 272; *Cocks v. Weeks*, 7 Hill, 46; *Watkins v. Stevens*, 4 Barb. S. C. R. 170; *Stafford v. Bryan*, 2 Paige's Ch. R. 45; *Murray v. Coster*, 20 John. R. 576; *Brewster v. Hardeman*, Dudley's R. 138.

In *Read v. Williams*, 2 Wash. C. C. R. 514, Mr. Justice Washington charged the jury that "anything which is added, tending to negative a promise, must be considered as qualifying every other expression; and, as the whole must be taken together, it amounted to a refusal to pay, which can never be construed into a promise to pay." In *Clemenston v. Williams*, 8 Cranch, 72, one partner, who was sued, acknowledged the amount was due, and he supposed it had been paid, but had not paid it himself, and did not know of its being ever paid, Chief Justice Marshall held that these words were not sufficient from which to infer a promise. He said, "It is not sufficient to take the case out of the act, that the claim should be proved to be acknowledged to have been originally just; the acknowledgment must go to the fact that it is still due." In *Wetzell v. Bussard*, 11 Wheat. 310, the same learned Judge conceded that an unqualified admission that the debt is due at the time, had been held to remove the bar created by the statute. But where the terms of the acknowledgment are in any degree equivocal, or where some qualification has been annexed to the admission, the question whether the declaration of the party amounts to an acknowledgment of an existing debt on which the law will raise an assumpsit, had been differently determined. He said, "We think, upon the principles expressed in the case in 8 Cranch, above cited, that an acknowledgment which will revive the original cause of action, must be unqualified and unconditional. It must show, positively that the debt is due, in whole or in part. If it be connected with circumstances which in any manner affect the claim, or, if it be conditional, it may amount to a new assumpsit, for which the old debt is a sufficient consideration; or, if it be construed to revive the original debt, that revival is conditional, and the performance of the condition, or a readiness to perform it, must be shown." In the case then under consideration, the defendant said to one witness, that, if the plaintiff had come forward and settled certain claims, he would have given him his powder; and to another he said, "he should be ready to deliver the powder, whenever the plaintiff settled a suit which Doctor Ewell had brought against the defendant in the Court of Alexandria, on account of a patent-right and machine sold to him by the plaintiff." The Chief Justice held that these declarations did not amount to an *unqualified and*

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promises to pay the old debt when he is able, or by instalments, or in two years, or out of a particular fund, the creditor can

unconditional acknowledgement that the original debt was justly demandable. They asserted a counter claim on the part of the defendant, which he was determined to oppose to that of the plaintiff. He did not mean to give validity to the plaintiff's claim, but on condition that his own should be satisfied. In *Bell v. Morrison*, 1 Pet. R. 351, Mr. Justice Story adhered to the rule that the acknowledgment must show, positively, that the debt is due, either wholly or in part, and must be unqualified. If the bar is sought to be removed by a new promise, that promise, as a *new cause of action*, ought to be proved in a clear and definite manner, and to be in terms unequivocal and determinate. And if there be no express promise, and a promise is to be raised by implication of law, from the acknowledgment of the party, such an acknowledgment ought to contain an unqualified and direct admission of a previous subsisting debt, which the party is able and *willing* to pay. On the contrary, if there be accompanying circumstances, which repel the presumption of a promise or intention to pay,—if the expression be equivocal, vague and indeterminate, leading to no certain conclusions, but, at least, to probable inference, which may affect different minds in different ways, they ought not to go to a jury as evidence of a new promise to revive the action. He declared his opinion expressly, that any other course would open all the mischief against which the statute was intended to guard innocent persons, and expose them to the danger of being entrapped in careless conversation, and betrayed by perjuries. And it was far from being certain, that, if the early interpretation of the statute had been adhered to,—namely, that nothing but an express promise should take a case out of the statute,—it would not have been in promotion of justice. The same general doctrine is recognized in *Moore v. Bank of Columbia*, 6 Pet. 86. The same doctrine prevails in Pennsylvania. See *Smith v. Freel*, Add. R. 291; *Cowan v. Maguarar*, Wallace's R. 66; *Bell v. McCall*, 1 Brown, 128; *Hudson v. Carey*, 11 S. & R. 13; *Bailey v. Bailey*, 14 S. & R. 197; *Gallagher v. Milligan*, 3 Penn. 177; *Guier v. Pearce*, 2 Brown's R. 35; *Fries v. Boisselet*, 9 S. & R. 128; *Jones v. Moore*, 5 Binn. 573; *Gleim v. Rise*, 6 Watts' R. 44; *Berghaus v. Calhoun*, 6 Watts' R. 219; *Gilkyson v. La Rue*, 6 Watts & Sergt. 213; *Hay v. Kramer*, 2 Watts & Sergt. 137; *Magee v. Magee*, 10 Watts' 172; *Mann v. Warner*, 4 Whart. R. 455; *Allison v. James*, 9 Watts, 380; *Hogan v. Bear*, 5 Watts. 111. So, too, in New York. See *Danforth v. Culver*, 11 John. R. 146; *Laurence v. Hopkins*, 13 John. R. 288; *Sands v. Gelston*, 15 John. R. 511; *Purdy v. Austin*, 3 Wend. R. 187; *Hancock v. Bliss*, 7 Wend. R. 267; *Bradley v. Field*, 3 Wend. 272; *Stafford v. Bryan*, 3 Wend. 535; *Gaylord v. Van Loan*, 15 Wend. R. 308; *Allen v. Webster*, 15 Wend. R. 284; *Stafford v. Richardson*, 15 Wend. 302; *Clarke v. Dutcher*, 9 Cowen, 674; *Rosevelt v. Mark*, 6 John. Ch. R. 290; *Vankeuren v. Parmelee*, 2 Comstock's R. 531; *Watkins v. Stevens*, 4 Barb. S. C. R. 170; *Cocks v. Weeks*, 7 Hill, 46; *Tompkins v. Brown*, 1 Denio's R. 247. In this State, it is now provided by statute, no acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the case out of the statute, unless the same be contained in some writing, signed by the party to be charged thereby, with a provision that this section shall not alter the effect of any payment of principal or

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claim nothing more than the promise gives him. And the same consequences, I conceive, will follow upon that sort of acknow-

interest. Code of Procedure, 1849; Laws of 1849, p. 638, § 110. A similar provision was contained in the Code of 1848. I am not aware that any decision has been made under this code, as to what will be a sufficient writing to bring a case within this act. The effect of the act upon demands barred by the statute before the Code of 1848, has been before the court, and it has been held that a promise made since the Code took effect, to pay a debt which was barred by the statute of limitations before the Code went into operation, will not revive the cause of action unless such promise be in writing, subscribed by the party to be charged thereby. *Wadsworth v. Thomas*, 7 Barb. S. C. R. 445. So, too, in Massachusetts, the doctrine of *Bell v. Morrison* prevails. *Bangs v. Hall*, 2 Pick. 369; *Bailey v. Crane*, 21 Pick. 323; *Barnard v. Bartholomew*, 22 Pick. 291; *Sumner v. Sumner*, 1 Metc. 394; *Webber v. President, &c. of Williams College*, 23 Pick. 302; and now, under the Revised Statutes of that Commonwealth, chap. 120, § 13, the acknowledgment or promise must be made, or contained in some writing signed by the party chargeable thereby. Under that statute it has been held that, where a debtor, (the surviving member of a firm, who owed W. a debt. of \$20 for goods sold,) wrote a letter to the creditor within six years next before W. sued him for the goods, saying that W.'s bill ought to have been paid before, and promising to attend to it in a short time,—(the debtor afterwards took advantage of the insolvent law, and entered on the schedule of his debts the sum of \$20, as due to W.)—that these facts showed a sufficient definite acknowledgment of the \$20 debt due to W. to take the case out of the statute of limitations under the Revised Statutes: *Woodbridge v. Allen*, 12 Metcalf's R. 470. So, too, in Maine, the rule in *Bell v. Morrison* prevails: *Perley v. Little*, 3 Greenleaf's R. 97; *Porter v. Hill*, 4 Greenl. R. 41; *Miller v. Lancaster*, 4 Greenl. 159; *Thayre v. Mills*, 2 Shep. R. 300; *Lombard v. Pease*, 2 Shep. 349; *Oakes v. Mitchell*, 3 Shep. 360; *Coffin v. Bucknam*, 3 Fairf. R. 471; *Brackett v. Mountford*, 3 Fairfield, 72; *Warren Academy v. Starrett*, 3 Shep. 443. So, too, in Connecticut: *Deforest v. Hunt*, 8 Conn. R. 185; *Belknap v. Gleason*, 11 Conn. R. 160; *Austin v. Bostwick*, 9 Conn. 496. So, too, in New Hampshire: *Russell v. Copp*, 5 N. H. R. 154; *Exeter Bank v. Sullivan*, 6 N. H. R. 124; *Blair v. Drew*, 6 N. H. R. 235; *Kelly v. Sanborn*, 9 N. H. R. 46; *Kitridge v. Brown*, 9 N. H. R. 377; *Ventris v. Shaw*, 14 N. H. R., 2d ser., v. 2, p. 422; *Manning v. Wheeler*, 13 N. H. R. 486. Chancellor Vroom, in New Jersey, in the case of *The Executors of Connover v. Connover and others*, Saxt. Ch. R. 403, applied the rule laid down in *Bell v. Morrison*. He said, "What promise or admission will take the case out of the operation of the statute, has been long much controverted in court. Different judges took different views of the question, and various devices were resorted to, to evade the statute. One refinement was added to another, until the provisions of a wholesome law became almost a nullity. Of late years, these refinements have been approached for examination, and the glare of great names having passed away, it has been found upon a close inspection, that they are destitute of sound sense and practical utility to support them. The late decisions have corrected the errors which were afloat, and given the true construction of the statute, and in a way calculated to settle it." In Vermont, the rule

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ledgment which is found in a will like the present, creating a trust for paying debts barred by the statute of limitations. The creditor will get nothing but what the trust gives him.[2] This

has been laid down thus: "That an unqualified acknowledgment of the debt as unpaid and still subsisting, is evidence from which a new promise to pay is to be inferred. In deciding what shall amount to such an acknowledgment, we have discarded the old rule of construction, which had nearly operated to repeal the statute, and we now hold that the conduct and declarations of the party shall be understood in their natural and obvious sense, as if applied to any other subject." *Phelps v. Stewart*, 12 Vermont R. 263. See, also, *Barlow v. Bellamy*, 7 Vermont R. 54; *Cross v. Conner*, 14 Vermont R. 394. In Maryland, the acknowledgment of the debt, to take it without the statute, if not made in express terms, must be evidenced, at least, by facts, satisfactorily showing the admission of the debtor that the debt had never been paid. *Beltzhoover v. Yewell*, 11 Gill & John. 216. See, also, *Oliver v. Gray*, 1 Harr. & Gill, 204; *Sotheron v. Hardy*, 8 Gill & John. 133; *Frey v. Kirk*, 4 Gill & John. 509; *Rogers' Executors v. Waters*, 2 Gill & J. 69. In Virginia, Mr. Justice Parker says, "The modern decisions, discarding the distinctions and refinements which had gone nigh to repeal the statute of limitations, and justly considering it as an act of repose to protect against long dormant claims, even when they might not have been paid, have re-established the doctrine settled in England, soon after the making of the statute of 21 James 1, c. 16, from which our law is taken, namely, that the subsequent promise or acknowledgment to take the case out of the statute, ought to be such a one as, if declared upon, would support an action of itself; that is, it must be as express promise to pay, or such an acknowledgment of a balance then due, unaccompanied by reservations or conditions, as that a jury ought to infer from it a promise to pay." *Aylett's Executors v. Robinson*, 9 Leigh, 45. See, also, *Butcher v. Hixton*, 4 Leigh, 519; *Bank v. Clarke*, 4 Leigh, 603; *Sutton v. Burruss*, 9 Leigh, 381. Mr. Angel, in his *Treatise on Limitations*, sums up the rule of law on this subject thus: 1, That a debt barred by the statute of limitations, may be revived by a new promise; 2, That such new promise may either be an express promise or an implied one; 3, That the latter is created by a clear and unqualified acknowledgment of the debt; 4, That if the acknowledgment be accompanied by such qualifying expressions or circumstances as to repel the idea of an intention or contract to pay, no implied promise is created.* He adds, "The point to be resolved in all cases is, whether the acknowledgment or promise is grounded upon a presumption of payment, or whether it is a new contract springing out of, and supported by, the original consideration. It clearly appears, both upon principle and authority, that it is the latter; and the decisions of all the courts throughout the country are remarkably uniform in so establishing it." *Angel on Limitations*, p. 245, § 25.

[2] A devise of lands, in trust to pay debts, was formerly supposed to include debts upon which the statute of limitations had closed. See *Groffen v. Mill*, 2 Vern. 141; *Blakeway v. Earl of Stafford*, 2 P. Wms. 373; *Andrews v. Brown*, Prec. in Chan. 385. The doctrine of the old case has undergone a reasonable modification, and a distinction has been made between those debts in respect to which the period of limitation had

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particular objection, therefore, to *Williamson v. Naylor* does not, I conceive, exist.

Another observation strongly in favor of *Williamson v. Naylor* is this: if the claimants had been treated as legatees, and not as creditors, the rights of a creditor to the benefit of the trust might have lapsed by his death in the lifetime of the testator. This could not have been in accordance with the intention of the debtor. His purpose must have been to be honest towards his creditors, and such is the proper construction of the will, unless the circumstance, that the testator has given to his creditors the residue of his estate, makes a difference. With respect to that point, the case, perhaps, would best be considered as one of obligation and bounty inseparably mixed together. It was a direction to pay the old debt, with such benefit (if any) as the residue might give, by way of compensation, for the inconveniences of delay. The direction to pay the debt would prevent the possibility of lapse, and the bounty would be explained.

I have only one other observation to make upon that [*301] *case. I believe I stated during the argument that I had reason to think the learned judge before whom *Williamson v. Naylor* was heard, on further directions, retained the opinion he then expressed. I find that his observations were directed only to show, that, whatever construction might have been put upon the will in that case, (whether as giving legacies or direct-

already been completed in the testator's life, and which are still presumed to be paid, and those upon which the statute had not run, and which, under a provision by will for payment of debts, are not subject to be barred by the statute running after the death of the testator, for the trustee's neglect shall not prejudice the creditor. See *The Executors of Fergus v. Gore*, 1 Sch. & Lef. 107. The modern doctrine in England and in this country seems to be that a devise of real or personal estate for the payment of just debts, will not revive a debt upon which the statute has fully operated before the testator's death. The testator, in such case, makes no promise, direct or implied, as he only intends that the courts of law and equity are to determine what are just debts. and to leave his executors at liberty to use all means of resistance against demands upon his estate to which the testator might have objected. See *Burke v. Jones*, 2 Vea. & Beav. R. 275; *Rosevelt v. Mark*, 6 John. Ch. R. 266; *Smith v. Porter*, 1 Binney, 209; *Peck v. Botsford*, 7 Conn. R. 172; Angel on Limitations, p. 245, § 26.

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ing payment of debts,) the result, except as to the legacy duty, would probably have been the same.

In considering whether I ought, in the present case, to accede to the prayer of the petition, I am bound to have regard to the fact, that the case made by the petition is a case affecting, or which might affect, the construction of the will. It is a case which ought to have been made in the first instance. There is no suggestion that facts are newly discovered, and no explanation is offered why the case was not brought forward in the earlier and proper stage of the proceedings. The argument before me was, that the decision in *Williamson v. Naylor* was unsatisfactory, and that there were circumstances which distinguished it from this case; but the circumstances relied upon for establishing the distinction were not such as to bring this case within *Coppin v. Coppin*. I heard nothing of any of the debts having been paid until the close of the argument; and then the fact was urged,—as it is now,—not as affecting the construction of the will, but only the particular creditors whose debts are said to have been paid.

The decree in this case was made in 1828, and the plaintiffs, in the absence of the creditors, then asked and obtained such inquiries with reference to the debts in question as they thought proper. In August, 1841, on further directions, inquiries were again directed with reference to those debts; and other inquiries were ordered to be made when the cause [*302] came on in December, 1842. And in January last, when the cause was heard a third time for further directions, the parties claiming to be creditors being before the court, no suggestion was made that any additional inquiries were necessary: the case was argued, and the parties in the cause took the chance of a determination being come to favorable to their interest. If the creditors had been parties to the cause, they would, in strictness be entitled to insist that no case should be made against them which was not made by the pleadings. In this case, although the creditors are not parties to the record, they, and the parties in the cause, have met in the master's office, and contested this case upon such grounds as the latter thought proper to bring forward; and the question is, ought they now to be allowed to

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make a new case against any creditor? There is, perhaps, no rule absolutely binding upon the court, but the indulgence now asked ought not to be granted, except under very special circumstances; and, in the present case, I think one of those circumstances ought to be this: that the court, at the time of making the order for further inquiries, ought to have before it such evidence of the truth of the case relied upon by the plaintiffs, that it can at once say, if that evidence cannot be controverted, the case is proved. I speak of a cause which has already been three times before the master, and in which no explanation is given why the new case was not adduced before. In such circumstances, that is not necessarily sufficient as a ground for inquiry, which might have been sufficient if adduced in the first instance. The statement that the last instalment of 14s. in the pound, making up 20s., was paid on some of these debts, is founded merely on the belief of the witness who deposes to it by his affidavit, but does not state the grounds of his belief. If

this deposition had been made in an examination upon [*303] *interrogatories, it would not be sufficient proof of the payment. Nor is it clear that the particular creditors, if paid the principal of their debts, might not have claim for interest; and if, at the date of the will, anything, however small, was due as a debt, (except for the statute of limitations,) the case would still fall within *Williamson v. Naylor*. In such a will as this, the circumstance that the testator has benefitted one creditor more, in proportion, than another, cannot have any weight.

On the other point of which I reserved the consideration, I am of opinion that the claim made by one of the parties interested in Thelluson's debt was a sufficient claim to entitle the creditors in respect of that debt to the benefit of this bequest. Although, *prima facie*, the last survivor of the partners would be taken to have an interest in the joint debt, yet that is not necessarily so; and if the representatives of another partner were excluded from the power of making the claim, the persons actually interested might be shut out from the benefit the testator intended for them without any default of their own. I do not

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say that the claim by a mere stranger would have been sufficient, but I think the claim actually made is sufficient.

The second petition which has been presented in the cause was unnecessary. The sum attributed to each debt may, where there is any question about the title to it, instead of being paid, be carried to the account of the parties to whom it has been found to be due upon the facts which are before the court; and the persons interested, or claiming to be so, may have liberty to apply in the usual way.

**WOOD v. ROWCLIFFE.*

[*304]

1844: January 19th.

Bill for the delivery up of specific chattels deposited by the plaintiff with A., his agent, which A. fraudulently contracted to assign to B., and B. advertised to be sold; and for an injunction to restrain the sale by B., and to restrain A. and B. from parting with the goods, the goods being still in the possession of A., the agent. Demurrer by B. overruled.

Whether the jurisdiction to protect by injunction the possession, and decree the delivery up of specific chattels, is confined to chattels the loss or injury of which would not be adequately compensated in damages, or which it may not be possible specifically to replace—*quære?*

THE bill stated, that, by an indenture dated in October, 1836, the plaintiff and J. D. Flood were appointed new trustees of certain trust funds, under a settlement for the benefit of John Wright, and Jane his wife, and their issue. That in June, 1837, the plaintiff and Flood lent to Knight, the husband of Jane, one of the children of John Wright and Jane his wife, 1830*l.*, part of the trust funds, upon the security of two warrants of attorney, one for 1680*l.*, and the other for 150*l.*, upon each of which judgment was entered up in July, 1837: that the plaintiff (Flood having died) caused a writ of *fieri facias* to be issued to the sheriff of Surrey, directing him to levy the sum of 1680*l.* upon the goods and chattels of Knight. The officer entered Knight's dwelling-house, in Nelson Square, and took in execution his household furniture and effects; and on the 27th of August, 1840, the sheriff executed to the plaintiff a bill of sale of such

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furniture and effects, (the particulars whereof were set forth in an inventory thereto annexed,) in consideration of 949*l.* 12*s.*, at which the same were appraised.

The bill set forth a copy of the inventory, and stated that the plaintiff took possession of the furniture and effects under the bill of sale; that, at the request of Wright and his wife, he allowed the same to remain in the house at Nelson Square: and that he appointed Elizabeth Wright, a daughter of John Wright and Jane his wife, to hold the bill of sale, and keep possession of the furniture and effects in the plaintiff's name: that, a day or two afterwards, Knight and his family removed to [*305] another residence; and that, in November, 1840, *Knight became bankrupt: that Elizabeth Wright, on behalf of the plaintiff, removed the furniture and effects to a house which she took, in her own name, in Meadow Place, in March, 1842; and shortly after such removal, Knight and his family went to reside with Elizabeth Wright at Meadow Place, and thenceforward continued to use the furniture and effects jointly with her.

The bill stated, that, in the absence of the plaintiff from England, and without his knowledge, Elizabeth Wright, in conjunction with Knight, borrowed from the defendant Rowcliffe various sums of money, and the defendant Rowcliffe alleged, that, to secure the repayment thereof, Elizabeth Wright and Knight had given to Rowcliffe their joint and several promissory notes; and that, by an indenture, dated the 31st of December, 1842, Elizabeth Wright had assigned to Rowcliffe all the household goods and furniture in the house at Meadow Place, set forth in an inventory therein referred to, (comprising the furniture and effects which belonged to the plaintiff under the said bill of sale,) upon trust, that Rowcliffe might, at any time after the 3d of May then next, whenever he should think meet, cause the said goods and effects to be sold as therein mentioned, and out of the money arising from such sale, after paying the expenses thereof, to repay himself the amount of such advances and interest thereon, and pay the surplus to Elizabeth Wright; and that Rowcliffe was thereby empowered to enter on the said premises and hold an auction there, and remove the furniture and effects thereupon: that, on the 21st of November, 1843, an advertisement

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appeared announcing the said furniture and effects for sale by auction on the 28th of the same month : that Elizabeth Wright and Knight were both of them, unable to repay the said advances, and that Rowcliffe threatened and intended to proceed with the said sale.

*The bill also charged that Elizabeth Wright held [*306] possession of the furniture and effects on behalf of the plaintiff since August, 1840, and that, by such possession of Elizabeth Wright, the plaintiff had ever since retained and did still retain possession of the furniture and effects for his own use and benefit absolutely ; that the plaintiff had applied to Rowcliffe to deliver up, or cause to be delivered up, to him (the plaintiff) complete possession of the same ; that the whole transaction relating to the indenture of the 31st of December, 1842, was a fraud concerted by Knight, and the defendants Wright and Rowcliffe, to deprive the plaintiff of the said furniture and effects ; and it prayed that the plaintiff might be declared the sole and exclusive owner of the said furniture and effects ; and that Elizabeth Wright and Rowcliffe, respectively, might be decreed to deliver up possession of the same to the plaintiff, and that they might respectively be restrained by injunction from parting with or disposing of the same to any person other than the plaintiff, and from selling or anywise injuring, or suffering to be sold or disposed of or anywise injured, the said furniture and effects ; and that Rowcliffe might be restrained from selling the same according to the advertisement.

Upon this bill an injunction was obtained *ex parte*. The defendant Rowcliffe afterwards demurred for want of equity.

Mr. *Kenyon Parker*, and Mr. *W. Hislop Clarke*, for the demurrer.

The case alleged by the bill is that of an agent, for a special purpose, exceeding her authority. The defendant Elizabeth Wright was appointed by the plaintiff to *keep pos- [*307] session of certain property consisting of common articles of household furniture ; the assignment of those articles is either

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a nullity, *Fenn v. Harrison*,^(a) or it would operate as a conversion, and therefore the plaintiff might bring trover: *M'Combie v. Davies*,^(b) *Stephens v. Elwall*.^(c) The remedy of the plaintiff is at law, and no difficulties are stated which require the interposition of equity. The jurisdiction of this court to enforce the delivery of specific chattels is not exercised except in cases where the chattel in question has some value annexed to it, or some character impressed upon it which is not transferrable to any other article of the same kind, and where the loss of the particular thing would be, in a sense, irreparable. This is obvious upon all the authorities. The passage on this subject by Lord Redesdale,^(d) in which the jurisdiction, in all these cases, is referred to the incomplete nature of the legal remedy,—to the circumstance that the justice of the case is not satisfied by the recovery of the value in trover, or by possibility the thing itself, in detinue,—would be unmeaning, if any kind of goods or effects were within the rule; and the cases would not have been put expressly upon the peculiar nature of the subject which was sought to be recovered: as the horn in *Pusey v. Pusey*,^(e) the tobacco-box of the club in *Fells v. Read*,^(f) the patera in the *Duke of Somerset Cookson*,^(g) the box of jewels in *Saville v. Tankred*,^(h) and the heir-looms in the *Earl of Macclesfield v. Davis*,⁽ⁱ⁾—all being articles of curiosity, antiquity, or hereditary estimation, which, as observed by Lord Eldon, in the [*308] case of *Nutbrown v. Thornton*,^(k) turned upon the *pretium affectionis*. The same considerations arose in *Lady Arundell v. Phipps*,^(l) where the injunction was granted to protect ancient family pictures, chattels which Lord Eldon describes “of a very special and peculiar kind.”^(m) It is on the same ground that the court decrees the delivery up of title-deeds, and the whole jurisdiction in enforcing the specific performance of agreements is an expansion of the like principle.⁽ⁿ⁾ In this

(a) 3 T. R. 757.

(c) Per Lord Ellenborough, 4 Ma. & Sel. 261.

(e) 1 Vern. 273.

(h) 1 Ves. 101; see Supp. (Belt) 72.

(k) 10 Ves. 162; see, also, 6 Ves. 779.

(m) Id. 147.

(b) 6 East, 537.

(d) Tr. on Pl., p. 117, ed. 4.

(g) 3 P. Wms. 389.

(i) 3 V. & B. 16.

(l) 10 Ves. 139.

(n) Lord Redesdale, Tr. Pl., pp. 117, 118, ed. 4.

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case there is no allegation that any article comprised in the inventory is of a nature which might not be immediately replaced by a common upholsterer. The case is analogous to those in which it has been ineffectually attempted to enforce the specific performance of an agreement to buy or sell government stock, where the court has left the party to his damages at law, (*Cud v. Rutter*),^(a) as affording an equally efficacious remedy.

Mr. Romilly, for the plaintiff, was not heard.

VICE-CHANCELLOR :—The case alleged by the bill is, that certain specific chattels, described in an inventory, were placed in the possession of Elizabeth Wright, to be held by her as the agent of the plaintiff; and that, in breach of her duty to her principal, she has contracted for the sale of these goods to a third party: and the question is, whether a court of equity will not, at the suit of the principal, restrain his agent from parting with the possession of *his property, by which [*309] the plaintiff's title would be embarrassed, if not defeated? I have not the slightest doubt that the plaintiff is entitled to the protection of the court against the wrongful act which is threatened by his agent. I have known many bills to have been filed in the Court of Exchequer, formerly, on behalf of the owners of cargoes, to prevent improper dealings with the goods by their agents, or persons in the situation of agents. The right to be protected in the use or beneficial enjoyment of property in specie is not confined to articles possessing any peculiar or intrinsic value. In this case, the plaintiff is clearly entitled to the injunction to restrain the sale of the goods, in order to carry into effect the attempted alienation of the property by Elizabeth Wright, and the right to the injunction will sustain the bill.

I proceed upon the ground that the furniture and effects are still in the possession of Elizabeth Wright; for, upon the allegations in the bill, that must be taken to be the case. I think the charge, that the plaintiff has applied to Rowcliffe for possession

(a) 1 P. Wms. 571.

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of the property, does not displace the previous allegation, that it is actually held by Elizabeth Wright on behalf of the plaintiff, and that her possession ever since August, 1840, has been the virtual possession of the plaintiff himself. I do not say that the bill could be sustained in its present shape, if, by the statements, the property appeared to be in Rowcliffe's possession ; nor do I give any opinion the other way.

Upon the question raised by the demurrer, the charge, that the transaction respecting the alleged assignment to Rowcliffe is a fraud concerted by him and the other defendant and Knight, as against the plaintiff, becomes also material.

Demurrer overruled.

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*ELLIS v. LEWIS.

1844 :—20th Jan., 16th, 19th, and 22nd Feb.

The testator devised all his real estate to a trustee upon trust for sale, with power to convey the same to purchasers without the concurrence of any person or persons beneficially claiming under his will ; and he directed the trustee to stand possessed of the proceeds of such sale, together with the residue of his personal estate, upon trust to pay one moiety of the interest and dividends thereof to his wife during her widowhood, and the other moiety of such interest and dividends (and the whole after his wife's decease or second marriage) to his sister for her life ; with remainder, as to the whole of the trust funds, to the children of the testator's sister for their lives and the life of the survivor ; remainder over. The widow of the testator was dowable of part of the real estate :—*Held*, that the widow was entitled both to her dower and to the benefit given to her by the will.

Where the devise of land is in trust for sale, the mode of applying the proceeds does not affect the question, whether the widow is entitled to her dower, or is put to her election.

W. ELLIS, by his will, dated in March, 1838, bequeathed his personal estate unto the defendant Lewis, upon trust to convert the same into money ; and after payment thereof of debts, and the legacies thereinbefore bequeathed, the testator directed, that, in the event of any surplus remaining, the same should sink into and form part of his residuary real estate ; and he devised all his

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messuages, lands, tenements, and hereditaments, and real estate whatsoever and wheresoever situate, lying, and being, unto the defendant Lewis, his heirs and assigns for ever, upon trust, as soon as conveniently might be after his (the testator's) decease, to sell and absolutely dispose of his said real estate in manner therein mentioned, and generally to do, perform, and execute all such further acts, matters, deeds, and things as might be requisite and proper for the purpose of effectuating and completing such sale or sales, and that as fully and effectually as he (the testator) himself could have done if living; with power to make and execute all necessary and proper conveyances and assurances of the said real estate to the purchaser or purchasers thereof, without the concurrence of any person or persons beneficially claiming under the said will; and he declared that the receipt or receipts of his said trustee should be a sufficient discharge for the purchase-money. And after charging the monies produced by such sale with payment of the expenses attendant on the execution of the said trusts, and so much of his debts and liabilities as his personal estate should not suffice to pay, he directed his trustee to invest such proceeds on government or [*311] real securities, and receive the interest and dividends thereof, upon trust, as to one moiety thereof, to pay the same unto his wife Nancy during her widowhood; and as to the other moiety of such interest, and as to the whole thereof after his wife's decease or second marriage, upon trust to pay the same into the hands of his sister Amelia White for her separate use; and after the decease or second marriage of his wife, and the decease of his sister, upon trust to continue the said principal monies at interest, and to receive the interest and dividends thereof, and pay and apply the same in and towards the maintenance of all such children of his sister as might be living at his (the testator's) decease, in equal shares until they should respectively attain the age of twenty-one years, and from and after they should respectively have attained that age, upon trust to pay the same interest and dividends to the said children in equal shares during their lives and the life of the survivor of them; and after the decease of such survivor, the testator devised and bequeathed the whole of the said principal monies unto the defendant

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Lewis, his executors and administrators. And he appointed his wife and the defendant Lewis, executrix and executor of his will. By a codicil the testator gave his furniture to his wife, and certain pecuniary legacies to others, and in other respects confirmed his will. The testator died in April, 1839. The bill was filed by the widow and executrix against Lewis, the executor, for the performance of the trusts of the will under the direction of the court, and that the rights of all parties thereunder might be ascertained.

On the cause coming on for further directions, the only material question was, whether the plaintiff, the widow, could claim her dower out of a certain part of the real estate of the [*312] testator of which she was dowable, *in addition to the benefits given her by the will, or whether she was put to her election.

Mr. *Romilly* and Mr. *Follett*, for the widow.

Mr. *Bazalgette*, for the defendant *Amelia White*.

Mr. *Randell*, for the defendant *Lewis*.

The arguments (which, as applicable to this point, will be found reported more at large in the undermentioned cases) were, on the part of the plaintiff, that the gift of the testator's lands and hereditaments must be necessarily confined to that interest which belonged to the testator, exclusive of the widow's dower; that there was no expression on the will of any intention to take away the right to dower as a condition of the bequest; that there was no ground to presume the testator intended tacitly to affect the widow's legal right; and that there was no inconsistency in the enjoyment by the widow both of her legal interest paramount to the will, and her testamentary interest under it. On the part of the defendants, it was contended, that the inequality which the double interest in the widow would occasion was irreconcilable with the intentions expressed by the testator, that his widow and sister should enjoy the income in equal moieties; and that the power given to the trustee to sell as effectually as the testa-

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tor could, without the widow's concurrence, was expressive of an intention to exclude any paramount claim of the widow over the estate: 1 Roper, Husband and Wife, p. 577, *Pearson v. Pearson*,(a) *French v. Davies*,(b) *Chalmers v. Storil*,(c) *Miall v. Brain*,(d) *Butcher v. Kemp*,(e) *Dickson v. Robinson*,(f) *Roadley v. Dixon*,(g) *Roberts v. Smith*,(h) *Dowson v. Bell*,(i) *Harrison v. Harrison*,(k) *Reynard v. Spence*,(l) *Taylor v. Taylor*,(m) *Holdich v. Holdich*,(n) *Birmingham v. Kirwan*,(o)

VICE-CHANCELLOR:—It appears, from some of the earlier cases, that a distinction was at one time supposed to exist between a devise of a testator's estate or interest in his lands, and a devise of the lands themselves by that description; it being considered in the former case that the devise did not, in the latter that it did, express an intention by the force of the language itself, that the devisee was to take the lands discharged of the widow's right to dower. But I take the law to be clearly settled at this day, that a devise of lands, *eo nomine*, upon trust for sale, or a devise of lands, *eo nomine*, to a devisee beneficially, does not per se express an intention to devise the land otherwise than subject to its legal incidents, that of dower included. There must be something more in the will, something inconsistent with the enjoyment by the widow of her dower by metes and bounds, or the devise standing alone will be construed as I have stated. The case of *French v. Davies*(p) is a direct authority for this proposition; and the current of the authorities which are collected in the last edition of Roper's Husband and Wife,(q) beginning with the leading case of *Lawrence v. Lawrence*(r) down to *Dowson v. Bell*,(s) confirm it. [*314]

(a) 1 Bro. C. C. 292.

(b) 2 Ves. jun. 572.

(c) 2 V. & B. 222.

(d) 4 Madd. 119.

(e) 5 Madd. 61.

(f) Jac. 503.

(g) 3 Russ. 192.

(h) 1 S. & S. 513.

(i) 1 Keen, 761.

(k) Id. 765.

(l) 4 Beav. 103.

(m) 1 Y. & Coll. 727.

(n) 2 Y. & C. C. C. 18.

(o) 2 Sch. & Lef. 444.

(p) 2 Ves. jun. 572.

(q) Vol. 1, p. 577.

(r) 2 Vern. 365, S. C. 9 Vin. ; Ab., tit. Dower, Q. 3, pl. 15, Q. 4, pl. 7, pp. 248, 249; 3 Bro. P. C., Dorn. ed., 483.

(s) 1 Keen, 761.

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If that be so, it is impossible, in the case of a devise of lands upon trusts for sale, that any direction for the application of the proceeds of such sale can affect the case. The devise is of land subject to dower. The trust to sell subject to dower, and the proceeds of the sale will represent the gross value of the estate minus the value of the dower. Whatever direction, therefore, for the mere distribution of the proceeds the will may contain, that direction must leave the widow's right to dower untouched.

I have made the above observations, because it was said, that, if in this case I should decide in the widow's favor, I should overrule the decisions in *Chalmers v. Storil*,^(a) *Robertson v. Smith*,^(b) and *Dickson v. Robinson*.^(c) If I thought those cases governed that before me, I need scarcely say it is not likely I should oppose my individual judgment to those of Sir William Grant and Sir John Leach. But it is quite clear those cases do not govern the present case. Sir William Grant certainly did not mean, in *Chalmers v. Storil*, to overrule *French v. Davies*, and other cases which had decided that a devise of lands, *eo nomine*, upon trusts for sale, or a devise of lands, *eo nomine*, would per se import an intention to devise the land otherwise than subject to its legal incident of dower. In that case the testator's personal estate and his lands were directed to be equally divided between his widow and two children, leaving the lands, therefore, to be enjoyed in specie. Sir William Grant concludes his judgment by saying, "Here the testator *says, [*315] the property thus bequeathed by him consists of these particulars: it is, therefore, the property itself thus described that is the subject of the devise; and not what might, in contemplation of law, be the testator's interest in that property." In *Roberts v. Smith* Sir John Leach follows the case of *Chalmers v. Storil* as an authority governing the case before him. The facts of the case of *Dickson v. Robinson* do not appear. All, therefore, which those cases decide is that which no one questions; that if, in the will, the court discovers an intention inconsistent with enjoyment by the widow of her right of dower by metes and bounds, that will put the widow to her election.

(a) 2 V. & B. 222.

(b) 1 S. & S. 513.

(c) Jac. 503.

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Whether, in all the three cases, the conclusion to which the court came can be reconciled with antecedent authorities, is not the question. The principle of the decisions is clear, and is in no respect departed from by my present decision. It was said by Sir Edward Sugden, in *Hall v. Hill*,^(a) that it is difficult to reconcile the authorities upon this question. I think, however, upon the whole, the balance of these authorities is in favor of the principle, that a devise of the testator's lands, without more, does not import an intention, on the part of the testator, to devise the lands otherwise than subject to the legal charges to which his estate therein is incident, and among which, in this case, is his widow's right to dower.

I found myself upon these two propositions: first, that a devise of land upon trusts for sale does not per se import an intention to pass the land otherwise than subject to the legal incident of dower; and, secondly, that the direction to divide the proceeds of the sale cannot decide what the subject of sale is, and there is no circumstance affecting the proposition in its application to the present case. *And I may observe, [*316] that the conclusion to which I have come upon the law of the case is fortified in its application in this instance, by the clause of the will, wherein the trustees are empowered to sell as fully and effectually as the testator himself could have done, if living; and the words relied upon in the argument, whereby the trustees are empowered to sell the property without the concurrence of any person beneficially claiming under the will, as far as they regard the widow, do not apply to her concurrence in respect of her dower, but in respect only of her beneficial interest under the will. I must, therefore, hold, that the widow is not, in this case, put to her election.

(c) 1 Dr. & War. 94.

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PLUNKETT v. LEWIS.

1844: February, 13th, 20th, 21st, and 28th.

A trust fund, to which a father was entitled for life, and his son and daughter in remainder, was sold, and the proceeds received by the father. Subsequently, on the marriage of the daughter, the father settled property for her benefit of a larger value than the proceeds of the trust fund:—*Held*, That the claim of the daughter against the father in respect of her share of the proceeds of the trust fund must be presumed to be satisfied by the settlement.

That neither the expression in the settlement of the consideration of natural love and affection, nor the ignorance of the husband of the rights of the wife in the trust fund, had the effect of excluding the presumption of satisfaction.

Evidence is admissible either to support or rebut the presumption—*semble*.

Whether, in the case of a portion of the precise amount of the debt, the expression of natural love and affection, as the consideration for the settlement, might not be material on the question of satisfaction—*quære*?

Advances made by a father to his son, simpliciter, not a purchase or satisfaction of the claim of the son to the proceeds of a trust fund belonging to the son, possessed by the father after such advances.

In the month of January, 1827, a sum of 10,500*l.* new 4*l.* per cent. annuities, and 2048*l.* 6*s.* 8*d.* 3*l.* per cent. Reduced annuities, were standing in the name of C. Monro, upon trust for Lyndon Evelyn for life, with remainder to his son and daughter, Colonel Evelyn and the plaintiff Mrs. Plunkett. This, together with other property, was the subject of a settlement made in 1789, on the marriage of Lyndon Evelyn and his late wife. In January, 1827, Lyndon Evelyn wrote to Monro a letter, stating facts to show that he and his two children together were [*317] absolute owners of the stock in question, and proposing to Monro that the stock should be transferred into the three names of the cestui que trusts, concluding,—“It appears to me, that, if the stock were transferred into our three names, (Frederick, Elizabeth, and mine,) it would march in the course pointed out by the settlement, excepting that they (Elizabeth and Frederick) would have an immediate interest, in the place of one commencing at my death. My children, quite ready to accede to any arrangement that I should choose, have a claim to a better position than they have at present.” The stock was accordingly transferred by C. Monro, in February, 1828, into

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the names of the three cestui que trusts ; and in June following they executed a general release to C. Monro. The stock continued in this state, Lyndon Evelyn receiving the dividends, until June, 1833.

In 1833 Lyndon Evelyn contracted to purchase estates of large value from Lord Oxford ; and in the months of June, 1833, and February, 1834, the said two sums of stock were sold under powers of attorney, granted by the plaintiff (then Elizabeth Evelyn) and Colonel Evelyn to their father, and the proceeds, amounting to 11,445*l.*, were received by him and applied to his own use, principally, though not wholly, in the payment of the purchase-money to Lord Oxford.

On the 7th May, 1837, Colonel Evelyn died ; and, it being supposed that he died intestate, administration of his estate was granted to his father Lyndon Evelyn. Two testamentary papers of Colonel Evelyn, dated in April, 1834, and January, 1836, were afterwards produced and proved, under which the plaintiff, his sister, and J. Coningham were named executors. Under the will of Colonel Evelyn, the plaintiff, his sister, took an interest for life in a moiety of his property, with remainder *to her children, if any, and if no children, remain- [*318] der over. The will was proved by the plaintiff and J. Coningham.

On the 29th December, 1838, the plaintiffs Mr. and Mrs. Plunkett were married, and, on that occasion, a settlement was made, which was the subject of three indentures. By the first indenture, dated the day preceding the marriage, to which Lyndon Evelyn, both the plaintiffs, and others were parties, it was expressed to be proposed and agreed on the part of the plaintiff Mrs. Plunkett, (then Elizabeth Evelyn,) that Lyndon Evelyn should advance 16,000*l.* of which a competent part should be applied in discharging incumbrances then existing on certain estates, to which the plaintiff Mr. Plunkett was therein stated to be entitled in possession and in remainder expectant on the death of his father Lord Dunsany, and the residue applied in discharging other liabilities of Mr. Plunkett ; and certain real estates in Herefordshire and Radnorshire were thereby settled upon uses and trusts for the benefit of Lyndon Evelyn and the

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plaintiffs, and the children of the plaintiffs, with remainder, as to the Radnorshire estates, to the uses declared of the Dunsany property in the second deed of even date, and, as to the Herefordshire estates, to the use of Lyndon Evelyn in fee ; and Lyndon Evelyn also covenanted, that, within six months after his death, 20,000*l.* should be paid out of his estate, and invested upon the like uses with those thereby declared of the Radnorshire estates. By the second indenture of the same date, to which the plaintiffs, Lyndon Evelyn, and others were also parties, the plaintiff Mr. Plunkett settled and covenanted, on the death of his father, to settle all the Dunsany estates in tail upon uses and trusts for the benefit of the plaintiffs and their children.

The third indenture, to which it did not appear that [*319] Lyndon Evelyn was *a party, related exclusively to the beneficial interest of Miss Evelyn in the property she derived under the will of her brother Colonel Evelyn, and which was thereby covenanted to be settled in the manner therein mentioned.

Lyndon Evelyn died in April, 1839. His will, whereby he devised and bequeathed his real and personal estate to the defendant Francis Evelyn, subject to certain legacies to others of the defendants, was proved by the defendant Robert Lewis, his executor.

The bill was filed by Mr. and Mrs. Plunkett, praying that the defendant Lewis, as such executor, might be decreed to replace the said sums of 10,500*l.* and 2048*l.* 6*s.* 8*d.* trust stock, and that an account might be taken of what was due from the estate of Lyndon Evelyn in respect thereof ; that the plaintiffs and the defendant J. Coningham might be declared entitled thereto ; and that, if necessary, a sufficient portion of the real estate might be sold or mortgaged in order to satisfy the same.

The plaintiffs did not by their bill admit that the real estates of Lyndon Evelyn were effectually devised. The bill averred that the defendant Francis Evelyn claimed to be devisee of the real estate, but alleged that the plaintiff was the heiress-at-law of Lyndon Evelyn. The defendants, (except Coningham,) by their answer, insisted that the interests of the children of Lyndon Evelyn had been voluntarily given up by them to their

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father ; or, that, if not, the share of the daughter therein had been satisfied by the property settled for her benefit, upon her marriage, and the share of the son by several sums of money advanced to him. The defendants insisted upon the validity of the will as a devise of the real estates. Much evidence was gone into, which it is not necessary to state, further than to refer to the result, as it appears on the conclusion of the court upon *it. It appeared that a creditors' suit for the [*320] administration of the estate of Lyndon Evelyn had been instituted by the plaintiff Mr. Plunkett, and in that suit the plaintiffs had made no claim in respect of the stock in question in this suit. A legatees' suit had also been instituted for the administration of the same estate, and in that suit the present claim had been made, and afterwards withdrawn.

Mr. *Swanston*, Mr. *Hodgson*, and Mr. *Calvert*, for the plaintiffs.

Mr. *Willcock*, for the defendant Coningham, in the same interest as the plaintiff as to one moiety of the fund in question.

Mr. *Romilly* and Mr. *Bacon*, for the devisee of the real estate.

Mr. *Cankrien*, for legatees whose legacies were charged on the real estate.

Mr. *Kenyon Parker* and Mr. *Glasse* for Lewis the executor.

The several points raised in argument, so far as they called for decision, are the subject of distinct consideration in the judgment.

The cases cited in support of the proposition, that the claim of the plaintiffs was not satisfied, either by the settlement or by advancement, were the following :—*Chidley v. Lee*,^(a)

(a) *Pro. Cha.* 228.

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[*321] *M Dowall v. Halfpenny*,(a) *Prime v. Stebbing*,(b) *Clark Sewell*,(c) *Barclay v. Wainright*,(d) *Tolson v. Collins*,(e) *Ex parte Pye*,(f) *Drewe v. Bidgood*,(g) *Stocken v. Stocken*,(h) *Smith v. Lyne*,(i) *Wharton v. Earl of Durham*,(k) And the other cases, referred to as supporting the contrary proposition, were,—*Seed v. Bradford*,(l) *Wood v. Briant*,(m) *Farnham v. Phlllips*,(n) *Bugres v. Mawbey*,(o) *Chave v. Farrant*,(p) *Goldsmid v. Goldsmid*,(q) On the queetion of the admissibility of evidence to raise or repel the presumption of satisfaction, *Baker v. Paine*,(r) *Hincheliffe v. Hincheliffe*,(s) *Druce v. Denison*,(t) *Rrimmer v. Bayne*,(u) *White v. Williams*,(v) *Langham v. Sanford*,(w) *Monck v. Lord Monck*(x) were cited. 2 Story Com. Eq. Juris., p. 473, s. 1121, and 2 Rop. Leg. 57, were also referred to on the general argument.

VICE-CHANCELLOR :—The questions argued before me were, first, whether the transaction relating to the trust funds, derived under the settlement of 1789, the subject of this suit, (which, for distinction, I will call the trust stock,) amounted to a gift of that trust stock by the children to their father Lyndon Evelyn ;

[*322] or whether, at the time of the marriage *of his daughter, he remained debtor, in equity, to his children, for the proceeds of such trust stock. Secondly, whether such claim (if any) as, at the time of her marriage, Miss Evelyn had against her father, in respect of her moiety of the trust stock, was satisfied by the settlement of 1838. Thirdly, whether the claims of Mrs. Plunkett, and of the defendant Coningham, as one of Colonel Evelyn's executors, in respect of his moiety of the trust stock, were affected by the settlement of 1838, or by advance-

(a) 2 Vern. 484.

(b) 2 Ves. 409.

(c) 3 Atk. 98.

(d) 3 Ves. 466.

(e) 4 Ves. 483.

(f) 18 Ves. 140.

(g) 2 S. & S. 424.

(h) 4 My. & Cr. 95.

(i) 2 Y. & C. C. C. 345.

(k) 5 Sim. 297 ; 3 Myl. & K. 472 ; 10 Bligh, N. S., 526 ; 3 Cl. & Fin. 146, S. C

(l) 1 Ves. 501.

(m) 2 Atk. 521.

(n) Id. 215.

(o) 10 Ves. 319.

(p) 18 Ves. 8.

(q) 1 Swanst. 211.

(r) 1 Ves. 457.

(s) 3 Ves. 516.

(t) 6 Ves. 397-9.

(u) 7 Ves. 508.

(v) 3 V. & B. 72.

(w) 2 Mer. 17.

(x) 1 Ba. & Be. 298.

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ment. Fourthly, whether the plaintiffs in this suit could affect the real estate of Lyndon Evelyn, in order to satisfy such claim as they may establish in the suit.

In considering the second question, which I shall first notice, it is to be observed that the claim of the plaintiff was to one-half of the 11,445*l.*, after her father's death; and the advance he makes upon her marriage is 16,000*l.* in ready money, and 20,000*l.* more within six months after his death, besides a settlement of land, the property thus settled being estimated at 70,000*l.* in the whole. It was not argued before me, (nor could it have been argued with success,) that such provision would not satisfy Miss Evelyn's claim, by reason only that the advances so made and agreed to be made were, in their nature and character, so different from the father's liability, that one could not be presumed to be a satisfaction of the other; or that satisfaction is not to be presumed in this case, unless from the terms and construction of the entire settlement, (consisting of the three deeds,) or from the whole transaction, the application of the doctrine of satisfaction ought to be excluded.

I certainly think that the transaction of February, 1828,—the transfer of the stock by Monro to the three *cestui que trusts*,—left the beneficial interests of the parties *un- [*323] touched. When Mr. Evelyn says, "it will march in the course pointed out by the settlement," I think he meant only that the transfer itself would be in accordance with those trusts. What he meant by the "exception" which follows is not so clear. But no suggestion of an intention to change the rights of the parties by the mere transfer is made, and, in that state of things, I think those rights would remain as before. Having come to this conclusion as one of law, I have felt at liberty to look into the evidence, to see whether anything would thereby appear inconsistent with this conclusion; and it is satisfactory to me to find very conclusive testimony that such was Lyndon Evelyn's understanding as to the mere effect of the transfer, and until the trust stock was sold in 1833 and 1834. If anything constituted Lyndon Evelyn the owner of the trust fund, it was the sale of that stock and payment of the proceeds to him, as of the free gift of his children. The truth of the case, as regards that transac-

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tion, is not perfectly clear upon such of the evidence as is strictly admissible; but I shall, for the purpose of trying this case, (so far as the claim of Mrs. Plunkett in her own right is concerned,) suppose that Lyndon Evelyn remained accountable to his children, as before the sale, for their interest in the trust stock.

Now, the rule, as stated, (a) and, I believe, correctly stated, is this: that, where a debt exists from a parent to a child, "an advancement upon the child's marriage, or upon some other occasion, of a portion equal to or exceeding the debt, in the parent's life, shall *prima facie* be deemed a satisfaction." I think this presumption, in the abstract case, is just and reasonable. If a debtor pays to his creditor a sum equal to his debt, the pre-

sumption must be, that he intends by the payment to
 [*324] *discharge the debt; and if, instead of paying it into the

hands of the creditor, he pays it to another for the use and benefit of the creditor, as part of a transaction to which the creditor is a consenting party, the presumption in the abstract must be the same. I say in the abstract, because all the cases show that the presumption may be rebutted, and that the circumstances of each case must be considered before the court can decide, whether, upon the whole case, the presumption is to be admitted or rejected. In this case, the existence of a debt of ascertained amount, and the advance by the father to an amount far exceeding the amount of the debt, and that on behalf of the daughter, in a transaction to which she was a party,—all concur. But it was said, first, that, in the settlement by Lyndon Evelyn, distinct considerations (which I have already noticed) were expressed, and that the expression of those considerations excluded the satisfaction; secondly, that the entire settlement was a purchase from the husband, and that, as he gave value for the lady's settled fortune, it would not be presumed that the whole intention of the parties was not expressed in the settlement; and, thirdly, that the husband had no notice of his wife's rights in the trust stock, and, therefore, could not be barred.

In *Wood v. Bryant*, (b) the father was administrator *durante minore ætate* of an estate under which his daughter was inter-

(a) 2 Roper, Leg. 57.

(b) 2 Atk. 521.

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ested to an extent not exceeding 500*l.* On her marriage the father agreed to give his daughter 800*l.* as a portion, and in consideration of natural love and affection ; and in that case, as in this, the argument was founded, *inter alia*, upon the expression of consideration. Lord Hardwicke went fully into the law upon the broad principle of satisfaction ; and, independently *of some delay, to which he adverted, held it a satisfac- [*325] tion. He said, “There are very few cases where a father will not be presumed to have paid the debt he owes to a daughter, where, in his lifetime, he gives her in marriage a greater sum than he owed her ; for it is very unnatural to suppose that he would choose to leave himself a debtor to her, and subject to an account.” And he expressed his disapprobation of *Chidley v. Lee*,^(a) in which Sir J. Trevor went upon the ground that the husband was ignorant of his wife’s claim. The case of *Seed v. Bradford*^(b) contains a very clear expression of Sir John Strange’s opinion upon the abstract point, although he fortified his opinion upon that point by the acquiescence, to which he referred. In that case, also, the husband appears not to have known of his wife’s right until after the marriage. In *Chave v. Farrant*,^(c) the father, owing 150*l.* to his children, as executor of their grandfather, covenanted in their settlements to pay 1000*l.* each for the portions of his daughters. It did not appear that the husbands knew of the debt. Sir W. Grant was clear upon the point.

The above cases, which bring the law down from Lord Hardwicke to the time of Sir W. Grant, have, I believe, always been considered as showing the law of the court. They clearly decide, that neither the expression of natural love and affection as the reason of the gift, nor the ignorance of the husband of his wife’s rights, will necessarily prevent the application of the doctrine of satisfaction. And if the acts and declarations of the parties, as proved in evidence, are to be taken into account in this case, (as in some of the cases they have been,) it is impossible to say they do not, in the clearest *manner, [*326] confirm the conclusion to which, without those acts and declarations, I should come.

(a) Pre. Cha. 228.

(b) 1 Ves. 500.

(c) 18 Ves. 8.

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I must not, however, be understood as intimating an opinion that the expression of natural love and affection, as the consideration of a portion given by a parent on the marriage of a child, may not, in any case, be entitled to weight. In the case of a portion being the exact amount of the parent's debt to his child, perhaps it might be material, at least in conjunction with other circumstances; for it might be said that natural love and affection could not be the motive for discharging a legal or equitable obligation: but that reasoning can have little weight where the father, as in this case, gives a portion so far exceeding his liability. There is here ample to satisfy the natural love and affection, without excluding the presumption that the debt was intended to be satisfied also.

With respect to the other point relied upon by the plaintiff, that the settlement must be construed as a purchase by the husband, I cannot comprehend how that bears upon the question. It is the advance by the father which, by presumption of law, satisfies his liabilities; and if that advance, simpliciter, would discharge him, I cannot understand the argument which supposes that the advance will lose its operation in the father's favor, because he obtains for the daughter the additional benefit of a settlement by her husband. I should have thought the argument in favor of satisfaction rather a *fortiori* from such circumstances. No case was produced sanctioning such an argument; and I think the observations of the Vice-Chancellor[*327] point strongly the other way. *He says, that, where the husband, in consideration of his wife's portion, settles his own estate, that is the same thing quoad satisfaction as if her fortune were settled.

None of the cases cited for the defendant, unless *Wharton v. Lord Durham*(b) be an exception, touches the present case. In that case John Lambton, at the time of his daughter's marriage, was seised in fee, under his brother William's will, of certain lands, subject to a term of years vested in trustees under the same will, for raising 15,000*l.*, to one-third of which, his daugh-

(a) 5 Sim. 314, 315.

(b) 5 Sim. 297; 3 Myl. & K. 472; 10 Bligh, N. S., 526.

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ter, afterwards Mrs. Wharton, was entitled. John Lambton had, by will, made before the marriage, given to the same daughter 10,000*l.* for life, with remainder to her children. On the marriage of Mrs. Wharton, John Lambton gave, as her portion, 15,000*l.*, upon trusts materially differing from the trusts of the will as to the 10,000*l.*; and by the marriage settlement it was declared, that the 15,000*l.* was in full satisfaction and discharge of Mrs. Wharton's claims under William Lambton's will; but no mention was made of the will of John Lambton. The claim was made in respect of the 10,000*l.* only. In the argument, (a) the Solicitor-General certainly states, that the 5000*l.* would not have been satisfied by the 15,000*l.*, unless that intention had been declared. But he does not explain why; and certainly the cases negative the abstract necessity for such a declaration. The question never would have arisen if it were so. The Vice-Chancellor does not adopt that reasoning of the Solicitor-General but says, the express declaration, that the 15,000*l.* shall satisfy one sum, (the 5000*l.*), is evidence of intention to confine it to that. (b) He goes elaborately through the other parts of the case and by no means founds his judgment upon that alone.

From *what Lord Brougham said on the re-hearing, (c) [*328] it might appear doubtful whether he adopted or not the suggestion at the bar to which I have adverted; but, from what he says in a later part of his judgment, (d) it is clear that he thought the effect to be given to a declaration, that a portion given on marriage was given in satisfaction of a particular sum, was matter for consideration only, though of great weight; and he refers to *Baugh v. Read* (e) a case which is explained by Lord Lyndhurst. (f) It is, however, unnecessary to pursue this inquiry further, for the point does not occur in the case before me.

I have been chiefly pressed in this case with the expression attributed to Lord Lyndhurst, (g) that "it was necessary, as far as related to this debt, (the 5000*l.*), that the provision in satisfaction of it should be in terms expressed; but, as far as related to

(a) 5 Sim. 309.

(b) Id. 316, 317.

(c) 3 Myl. & K. 478.

(d) Id. 481 et seq.

(e) 3 Bro. C. C. 192; 1 Ves. jun. 257

(f) 10 Bligh., N. S., 546, 547. (g) Id. 546; 3 Cl. & Fin. 156.

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the provision by the will, it was not necessary, because that effect is produced by the operation of law." I should, of course, follow the opinion thus intimated if it had been intended as the expression of a general rule, but I think it was not so intended; and taking it as applied exclusively to the case then before the House of Lords, it appears to me to have no bearing on the present case. That the passage referred to was not intended as expressing any abstract rule, may be inferred from the fact, that the point did not arise in the case of *Wharton v. Lord Durham*. No case had been cited on that point in the argument: the cases all support the contrary proposition; and, in fact, the doctrine itself would not exist, or call for adjudication, if such were the law. It is the absence of expression, [*329] and that only, which raises the *question in any of the cases. I consider the presumption of law to be, that the settlement would satisfy the debt; and that presumption, being in this case unopposed by any evidence whatever, becomes conclusive.

I should not, however, do justice to the defendant if I were to pass unnoticed the evidence in the cause, which, although it has proved unnecessary, is yet clearly admissible to support the presumption. [His Honor then stated the evidence given in support of the defence, that the settlement of 1828 was intended to satisfy and extinguish the claim of the plaintiff Mrs. Plunkett to her moiety of the trust stock; and, after saying that the evidence was conclusive against that claim, proceeded:—] It is, therefore, unnecessary to consider the first question,—whether the transaction, with regard to the trust stock, constituted a gift of that stock to the father,—so far as that question applies to Mrs. Plunkett. It is only with reference to the moiety of the trust stock claimed by the representatives of Colonel Evelyn that the questions raised in this suit remain to be considered. For this purpose, I must treat the case as if any stranger, and not Mrs. Plunkett, sustained the character of such representative, and was a plaintiff in this suit.

Colonel Evelyn was not, nor were his representatives, in that character, parties to the settlement. On the contrary, it appears, that, on the part of Coningham, the other executor, it was in-

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sisted that Colonel Evelyn's property should not form part of the property to be settled. I can find no principle for saying that an advance to the plaintiff upon her marriage can, in such circumstances, be presumed to affect Colonel Evelyn's share, only because she happened to be one of his representatives.

*[His Honor then proceeded to consider the evidence [*330] applicable to Colonel Evelyn's moiety of the trust stock, with reference to the first question,—whether there had been a gift of that moiety by the son to the father; and finally held that the facts whereupon to conclude that there had been any such gift, and that the circumstances did not call for any further inquiry on that point. His Honor held, also, that the advances shown to have been made by the father to the son, having all been made whilst the trust stock stood in the name of Monro, the trustee, and therefore before any debt in that respect had arisen as against the father, could not constitute any answer to the claim of the representatives of the son for his share in the proceeds of the stock.][1] The claim to the trust stock made

[1] Questions of advancement, are, always questions of intention, and the difficulties of solving them, are generally found in the kind of evidence, by which such intention is to be proved. In some cases, it has been considered that this intention, if not expressed, shall be inferred as matter of law from the character of the act; as where a parent convey land to the child, from a consideration of love and affection only; and if a parent pay the consideration money for land, or for stock, conveyed by another to the child. In these and in other cases the presumption of advancement may be rebutted. Where there are no statute regulations upon the subject, the question whether a child has been advanced or not, is a perplexing one. It has been held in Connecticut, where they have no statutes regulating the question, that the existence of the relationship of parent and child does not furnish sufficient ground to decide, that the delivery of a chattel, or the advancement of money, by the one to the other, was intended as a child's portion. Unexplained, this might as well be treated as a debt or a gift, as an advancement, as if it had been between other persons. A parent may be generous and liberal to his child, without placing him under future accountability, either to himself or to his estate; and he may discriminate in his favor, between his children if he pleases. The law, to be sure, supposes in ordinary cases of family arrangement that equality is equity, but no person so well as a parent knows how such equality and such equity can be best effected and promoted among his children. Where personal chattels are delivered by a parent to a child, or moneys are advanced to him or for him, there should be satisfactory evidence, besides the mere delivery or advancement to constitute them chargeable advancements or part portions. There must be evidence of such intention beyond the unexplained act. *Johnson v. Belden*,

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by this suit must, therefore, succeed with regard to the share of Colonel Evelyn in that fund, and fail so far as relates to the share claimed by the plaintiff in her own right.

20 Conn. Rep. 322. In *Scavin v. Scavin*, 1 Y. & Coll. 65, the plaintiff subscribed for 100 shares of stock in his own name, and 50 shares in the name of his son, in a joint stock company, and paid the deposits and calls, not only on the 100 shares, but also on the 50 shares. The certificates for the two classes of stock were delivered to plaintiff, and he received the dividends on both without any interference on the part of his son, until June, 1837, soon after which the son died and made his will, but took no notice of those 50 shares. Under the deed of settlement of the joint stock company, no person could hold more than 100 shares until a specified period, when it might be increased to 200 shares. It was held that this was not to be deemed an advancement, and that the son was trustee of the father for the 50 shares. In this case the Vice-Chancellor said, "It has been settled that a purchase by a father, in the name of his son, is *prima facie* an advancement of the son. The presumption is so, but of course this presumption may be rebutted. The father may certainly, even in cases where the doctrine of advancement is held to take place, receive the title deeds and the dividends; but although these circumstances may exist in such cases, yet there are circumstances in favor of the father, especially where the son is an adult." In *Jackson ex dem, Benson v. Matsdorf*, 11 John. Rep. 91, B. executed a deed of a farm in 1766, to R., the infant daughter of A., for the consideration of 112*l* received of A. This deed was not actually delivered to R., but remained in the possession of A. until it was afterwards surreptitiously taken away by K., and her husband, on which B. executed another deed of the same land to A.; at the time of the deed A. took possession of the premises, and continued in the possession, using and claiming them as his own from 1776 until the time of his death, about the year 1802. It was held that the taking of the deed in the name of K. was not an *advancement* to her by A., but was a trust for her father who paid the consideration. Mr. Justice Thompson, in that case said, "It is a question which has often been agitated in chancery, whether when a parent purchase land in the name of his child, it shall be deemed a trust for the father, or an advancement for the child; when the child is under age, it has generally been considered an advancement. But no case will be found, where a purchase so made has been held an advancement, when it expressly appears to have been the intention of the parent that it should not be considered as such, as it does in the case before us." In *Sidmouth v. Sidmouth*, 2 Beav. 447, moneys were invested in the funds by a father in the name of the son, the dividends of which were received by the father during his life, under a power of attorney from his son; it was held that this was an advancement and that the funds belonged to the son. In this case Lord Langdale, Master of the Rolls, held that the law applicable to such cases was, that where property is purchased by the parent in the name of his child, the purchase is *prima facie* to be deemed an advancement; the resulting or implied trust which arises in favor of the person who pays the purchase-money and takes a conveyance or transfer in the name of a stranger, does not arise in the case of a purchase by a parent in the name of a child; but still the relation of parent and child is only evidence of the intention of the parent to advance the child, and that evidence may be rebutted by

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The fourth and only remaining question is, whether the suit is so framed that the real estate of Lyndon Evelyn can be charged: and I am of opinion that it is not; and I am not aware of any authority for retaining the bill, to enable a plaintiff to prove that he has not the case he pretends to have. The bill must be dismissed with costs, so far as it seeks to obtain

other evidence, manifesting an intention that the child shall take as a trustee, and that the question generally was whether there was such other evidence. That contemporaneous acts, and even contemporaneous declarations of the parent may amount to such evidence. Subsequent acts and declarations of the parent were not evidence to support the trust, although subsequent acts and declarations of the child might be so, but generally speaking, the court were to look at what was said and done at the time. In other cases upon question of advancement, see *Pym v. Lockyer*, 5 Myl. & Cr. 29; *Twining v. Powell*, 2 Coll. 262; *Bailey v. Lloyd*, 5 Russ. 330; *Ansley v. Bainbridge*, 1 Russ. & M. 657; *Willis v. Black*, 4 Russ. 170; *Van Wyck v. Seward*, 6 Paige Ch. Rep. 62; *Prankerd v. Prankerd*, 1 Sim. & Stu. 1; *Gilbert v. Wetherell*, 2 Sim. & Stu. 254; *Skeats v. Skeats*, 2 Y. & C. 9; *Dunham v. Gates*, Hoff. Ch. Rep. 185; *Partridge v. Havens*, 10 Paige Ch. Rep. 618. In the latter case, Chancellor Walworth said, "The general rule, previous to the revised statutes, undoubtedly was, that if a man purchased real estate and payed for it with his own funds, and took a conveyance in the name of a third person; there was a resulting trust in his favor, unless the person in whose name the conveyance was made, could introduce some evidence to rebut the legal presumption of such a trust. But no such presumption arose when a parent advanced the purchase-money and took a conveyance in the name of his child. For in such case the law presumed the conveyance was intended as a gift or advancement to the child." In these cases where the law requires that the intention of advancement shall be expressed by the intestate in writing, it has been held that no parol declarations of the parent will control the original intention. See *Hatch v. Straight*, 3 Conn. Rep. 31; *Bulkeley v. Noble*, 2 Pick. Rep. 337; *Meeker v. Meeker*, 16 Conn. Rep. 383; *Johnson v. Belden*, 20 Conn. Rep. 322; *Barton, Judge &c. v. Rice*, 22 Pick. 508; *Ashley Appellant*, 4 Pick. Rep. 24. In Massachusetts, it is now provided by statute (R. S., c. 21, 89,) that all gifts and grants shall be deemed to have been made in advancement, if they are expressed in the gift or grant to be so made, or if charged in writing by the intestate as an advancement, or acknowledged in writing as such, by the child or other descendant." Under the provision of the act of 1805 which contained an analogous provision, it was held, no particular form of words were required to constitute an advancement, but they must be such as to show an advancement was intended. Where a child gave a receipt for articles delivered, promising to return them if called for, and the parent wrote underneath, that they were not to be exacted, but were to answer as a part of the child's portion, it was held to be an advancement. *Bulkeley v. Noble*, 2 Pick. Rep. 337. So of the word "articles that I let my daughter N. have" in a book containing a memorandum made by a parent, of advancement to his other children.

1844.—Plunkett v. Lewis.

payment of the claim of the plaintiffs in their own right, and so far as it seeks to charge the real estate. The representatives of Colonel Evelyn are entitled to the moiety of the proceeds of the trust stock ; and, with regard to that, the usual accounts of the personal estate must be directed.

[*331]

*MATTHEWS v. SMITH.

1844 :—February 10th.

Jurisdiction of the court to grant or dissolve an injunction, or commit for contempt, in cases where the plaintiffs or defendants, or other persons, publish notices or advertisements with reference to the subject of a suit, calculated to prejudice the rights, or misrepresent the relative position or character, of any of the parties to the cause.

ON the 18th of December, 1843, the plaintiff moved, upon notice, for an injunction to restrain the defendant from assigning or in any way disposing of the patents and partnership premises and property mentioned in the bill, and from using, exercising, or vending the said patents and patent manufacture ; and from granting licences, or permission to others to use, exercise, or vend the same ; and from using and permitting to be used the said partnership premises otherwise than for the benefit of the said co-partnership, and according to and in conformity with the articles of partnership, and from hindering the plaintiff from participating in the management of the said co-partnership business, and from having free access to the said partnership premises and the works and property of the said co-partnership, and the books and accounts belonging thereto ; and also to restrain the defendant from removing the books and accounts, and any of the said partnership property, from the several places where the same ought to be kept respectively, according to the provisions of the articles. After hearing the motion, the court, on the 20th of December, awarded the injunction to restrain the defendant from assigning, vending, or disposing of the patents and leasehold premises of the partnership, and from removing the books from the partnership premises, but made no further order.

1844.—*Matthews v. Smith.*

In the early part of February, 1843, the plaintiff caused the following advertisement, signed by his solicitor, to be inserted in the *Times* newspaper, and in the *Mining Gazette* :—

“Wire-rope patents.—The undersigned *is requested by [*332] Mr. Edmund Matthews, the plaintiff in a suit instituted by him against Andrew Smith of Millwall and White Lion court, Cornhill, wire-rope manufacturer, to give notice to all persons dealing with Mr. Andrew Smith that the above mentioned patents cannot be parted with or disposed of, or any licenses thereunder granted, without the consent of Mr. Matthews, and that Mr. Smith has not any legal right to buy materials for wire-rope, or receive money for the sales of wire-rope, except with the consent of Mr. Matthews; and all persons so dealing with Mr. Smith without Mr. Matthews’ consent, after this notification, must take upon them all the consequences, losses, damages, and legal proceedings which may be incurred by their so doing.—(Signed) A. B., &c., Solicitor.”

Mr. *Russell* and Mr. *Willcock*, now moved, on behalf of the defendant, that the injunction might be dissolved, or that the plaintiff might stand committed to the Queen’s prison for contempt of this court, in having published or caused to be published, the said advertisement.

They cited *Roach v. Hall*,^(a) where Lord Hardwicke said, that nothing was more incumbent on a court of justice than to preserve the proceedings from being misrepresented, or the public mind from being prejudiced with respect to parties and matters pending before it. In *Ex parte Jones*^(b) Lord Erskine describes the character of the publication which made it a contempt, “as interesting the public, prejudiced in favor of the author *by her own partial representation, to procure a [*333] different species of judgment from that which would be administered in the ordinary course.” In this case, the plaintiff, advertng to the suit in this court, left it to be inferred that the defendant was incapacitated from carrying on the business,

(a) 2 Atk. 469.

(b) 13 Ves. 239.

 1844.—Matthews v. Smith.

owing to the interference of the court, which was not only a misrepresentation of the result of the motion for the injunction, but was, in fact, an attempt to effect those very objects to which the court, on hearing the motion, had refused its sanction. They cited also *Cann v. Cann*.^(a) The notice was calculated to do serious injury to the trade.

Mr. *Kenyon Parker* and Mr. *Grove*, for the plaintiff, argued that the publication of the advertisement was not a contempt; it did not refer to the injunction, and did not affect to represent, and therefore could not misrepresent, any proceeding in the cause. It was, at the farthest, nothing more than an erroneous statement by the plaintiff of the relative position of the parties,—an error in law which the court would not visit with the penalties of a contempt.

[*334] *The VICE-CHANCELLOR said, that the insertion of the insertion of the advertisement in this form was not a contempt requiring the interference of the court by committal; but the plaintiff had, whether ignorantly or not, published an advertisement, containing a statement, composed partly of what the court had ordered, and partly of what it had not ordered. If an advertisement of this kind had been published before the motion for the injunction, he most probably would not have granted it. In obtaining that assistance from the court, the plaintiff had undertaken to do what should be right on his part, and, therefore, in upholding the injunction, the court would require the

(a) L. C., July 3d, 1754, (MS.) Motion by the Attorney General, that the defendants and Sarah Farley be committed, and be restrained from publishing, printing or vending the defendants' answers. Affidavits read. Cur.: Let Sir R. Cann and Sarah Farley be restrained as prayed; and let Sarah Farley stand committed for her contempt. And upon Sir R. Cann entering his appearance with the registrar, as upon an attachment, within ten days, let him be at liberty to come in and be examined touching the said contempt; and let the plaintiff exhibit interrogatories for that purpose in ten days after such appearance.

July 18th, 1754. It being admitted by the counsel for the plaintiff Lady Cann, that defendant Sir R. Cann has made his submission and paid the costs, and the said plaintiff not opposing, let the order as to Sir R. Cann be discharged, and let Sarah Farley be discharged out of the custody of the warden of the Fleet.

1844.—Matthews v. Smith.

plaintiff to insert such other advertisements as would correct the error contained in those which had given rise to this application.

The plaintiff undertook to insert other advertisements in a form which was then settled, and accepted on the part of the defendant.

WALTON v. BROADBENT.

1843: July 31.

Bill taken off the file by consent.

MR. WILLCOCK moved, on behalf of all the parties, that the bill, containing matters which they were unwilling should remain on the record, might be taken off the file, and cited *Tremaine v. Tremaine*.^(a) The case had been compromised.

The VICE-CHANCELLOR made the order.

*ATTORNEY-GENERAL v. RAY.

[*335]

1843: Note on *Attorney-General v. Ray*, (Vol. 2, 518.)

IN the report of this case (Vol. 2, p. 518) it appears that the order directed among other things, that the proper officer should attend and produce on the trial at law the original record of the proceedings filed in the suit. No objection was made with respect to the order for the production of the original interrogatories

(a) 1 Vern. 189.

 1844.—Attorney-General v. Ray.

and depositions in the Examiner's Office, but the Clerk of Records and Writs requested that the application, so far as related to the original records in that office, might be made to the Master of the Rolls, referring to the stat. 1 & 2 Vict. c. 94. The motion, as to the latter documents, was accordingly made before the Master of the Rolls, when his lordship, after reserving the question for consideration, finally refused the order; observing, that there was no sufficient proof before him that the production of the original record was absolutely necessary on a trial relating to a civil matter; that great inconvenience would ensue if the officers of the court were required to attend at different parts of the country with the records; and that such documents ought not to be exposed to the risk of loss or injury, or removed from their proper depositories. The reasons for refusing the order were so well explained in *Hennell v. Lyon*,^(a) that it would be sufficient to refer to that case.

 BROUGHTON v. BROUGHTON.

1844: April 27, 30.

It is sufficient to state that the copy of the bill served under the 24th Order of August, 1841, is a true copy; and not necessary to show (as in *Penfold v. Bouch*) the manner of examination.

MOTION for leave to enter the memorandum of service, [*336] under the Order XXIV. of August, 1841, of a *copy of the bill. The affidavit stated only that the copy served was "a true copy of the bill," and did not verify the manner of examination.

Mr. Barber, for the motion, said, that the case of *Penfold v. Bouch*^(b) had not been followed in the other branches of the court: a simple averment that the copy was "a true copy," without any more particularity, was deemed sufficient.

^(a) 1 B. & A. 184-187.

^(b) 2 Hare, 157.

1844.—Broughton v. Broughton.

The VICE-CHANCELLOR, after inquiry, said, that he had ascertained the practice before two of the other judges of the court to be as was stated. In deciding *Penfold v. Bouch* he had applied the ordinary rule of evidence, according to which the mere statement that one document was a copy of another was not deemed sufficient ;(a) but it was important that the practice of the court should be uniform, and he should, therefore, defer to the opinions of others, though by no means satisfied that his own practice was not the safer and better course.

Order made.

IN THE MATTER OF THE ACT 1 WILL. 4, c. 60, AND IN THE
MATTER OF NIGHTINGALE'S CHARITY.

1843: March 31. 1844: July 13.

By an indenture of 1634, a rent-charge was granted to certain trustees for charitable uses, and the last survivor of such trustees being unknown, the court, under the stat. 1 Will 4, c. 60, s. 23, on the petition of the persons who administered the charity before the rent-charges ceased to be paid, appointed new trustees, and a person to convey the rent-charge to such trustees.

By indenture made in 1634, a rent-charge of 6*l.* 2*s.* 6*d.* a year, arising out of certain premises in Glastonbury, was granted to twelve trustess therein named, their heirs and assigns, to distribute 6*l.* thereof annually on *the feasts of the [*337] Annunciation and St. Michael amongst the poor of the upper and lower alms-houses; the remaining 2*s.* 6*d.* being for the refreshment of the trustees who took the care and pains of attending to the performance of the trust. The premises were, by the same indenture, subjected to a further charge of 1*s.* per week, (nomine pœnæ) for every week that the rent-charge remained unpaid, with power of distress for the recovery of the same. And it was thereby provided, that, when eight or nine of the

(a) 1 Starkie on Evidence, 229, ed. 3; 2 Phillips on Evidence, 132, 133, ed. 9.

1844.—Re 1 Will. 4, c. 60, and Nightingale's Charity.

trustees should die, the surviving four or three should grant the rent-charge to twelve other trustees, to be named by the Bishop of Bath and Wells and the Dean of Wells for the time being.

The petition was presented by the perpetual curate and the overseers of the poor of the united parishes of St. John Baptist and St. Benedict, in Glastonbury, stating, that it did not appear that any new trustee had ever been appointed, but that, since the death of all the said trustees, and in particular since the year 1819, the rent charge had been paid to the clergyman and overseers of the said parishes, and by them distributed to the poor: that, for the last five years the owner of the premises subject to the rent charge had refused to pay the same, alleging, that the clergyman and overseers were not lawfully entitled to receive it. The petition stated that all the trustees were long since dead, and that it was not known who was the survivor of them, or in whom the legal estate in the rent charge was vested; that the Bishop and Dean were willing to nominate or appoint new trustees, but the petitioners were advised that the rent charge could not be conveyed to or vested in such new trustees without the aid of the court, and the petition prayed a reference to the master to appoint new trustees accordingly.

[*338] *Mr. *Freeling*, for the petititon, submitted that the case came clearly within the stat. 1 Will, 4, c. 60, s. 23. The court would presume that trustees living in 1634 were now all dead. Whether the case was brought within sect. 8 of the same statute by sect. 21, would depend on the question, whether the statute 52 Geo. 3, c. 101, empowered the court, in such a case, to make a summary order without suit.

THE VICE-CHANCELLOR made the order of reference in the terms prescribed by the 23d section.

THIS court doth order, that it be referred to the master &c., whether the petitioners are the persons administering the charities in the petition mentioned. And it is ordered, that the master do inquire whether all the persons in whom the rent charge in &c. was by the indenture of the 20th of February, 1634, vested, are dead; and, if dead, whether any any new trustees were ever appointed of the said rent charge; and if so, whether they are living or dead, and, if dead, who was the survivor. And

1844.—Re 1 Will, 4, c. 60, Nightingale's Charity.

the master is to order two successive advertisements to be published in the London Gazette, and in one or more of the newspapers circulating in the county of Somerset, giving notice that the representative of the last surviving trustee named in the said indenture of the 20th of February, 1634, is, within twenty-eight days, to appear or give notice to the master of his title, and prove his pedigree or other title as trustee; and if no person shall appear or give such a notice within such twenty-eight days, or the person who might appear or give such notice shall not, within thirty-one days after such notice or application, prove his title to the satisfaction of such master, then it is ordered, that the said master do approve of proper persons to be appointed trustees of the said rent charge, and also of a proper person to convey the charity premises to the trustees so to be appointed. [Reservation of further order until after the report.]

The master found that the petitioners were the persons administering the charity; and reported that he did not find that any new trustees *had been [*339] appointed, and no representative of the survivor of the last trustees had appeared, and he had therefore approved of the twelve persons named in his report to be new trustees.

July 13th.—THE VICE-CHANCELLOR confirmed the report, and appointed the persons therein named trustees of the rent charge, and appointed a person to convey the rent charge and premises to such new trustees upon the trusts of the indenture of 20th of February, 1634, in the room of the representative of the said last surviving trustee.

WOODALL v. WALKER.

1844; 29th January.

In a suit by a shareholder in a banking company, to restrain proceedings on, and set aside, a judgment against the public officer of the bank, the court allowed substituted service of the subpoena upon the attorney at law in the judgment, where the plaintiff at law was out of the jurisdiction, although he had not caused a *scire facias* on the judgment to be issued against the plaintiff in equity.

THE plaintiff had been a shareholder in the "Agricultural and Commercial Bank of Ireland." The defendants, Walker, Grierson, and various other persons, claimed to be creditors of the company, and brought ten different actions in the Court of Queen's Bench in Ireland against its public officers, for the recovery of alleged debts. In these actions, judgments upon confession were entered up in May, 1843, for various sums amounting to 17,520*l.* in the whole; the judgments in Walker's action being for the sum of 1056*l.* 2*s.* 3*d.*, and in Grierson's for 428*l.*

1844.—Woodall v. Walker.

11s. 1d. In November, 1843, judgments in the same actions, in the name of the public officers of the bank, were confessed in the Court of Queen's Bench in England, and thereupon a writ of *scire facias quare executionem non* was issued against the plaintiff upon the judgment in Grierson's action. The bill was filed to restrain proceedings in this and the other judgments, and set the judgments aside as against the plaintiff, impeaching the proceedings on which they were founded as being collusive and fraudulent, and intended not for the purpose of recovering debts owing by the company to the plaintiffs in the actions, [*340] *but to be used for enforcing contributions from persons who were, or had been, shareholders, towards liabilities irregularly incurred by the managing committee in Dublin.

The statements of the bill were verified by affidavit, by which it was also stated, that Grierson and Walker were residing out of the jurisdiction,—Grierson in Scotland, and Walker in Bavaria,—and that Messrs. *Johnston, Farquhar, and Leech* were the attornies at law for the plaintiffs on the record in all the judgments in the Queen's Bench in England.

Mr. *Romilly* and Mr. *Rolt* moved, that service of the subpoena in this suit on the attornies at law in the judgments, "*Walker v. Hodges, public officer, &c.,*" and "*Grierson v. Hughes, public officer, &c.,*" might be good service on the defendants Walker and Grierson. They submitted, that, as against Grierson, at whose suit the *scire facias* had been issued against the plaintiff, substitution of service on the attorney was within the ordinary rule; and that, as against Walker, who had obtained a judgment which he might at any time make use of in the same manner, the order to substitute service was equally necessary.

THE VICE-CHANCELLOR made the order to substitute service on the attornies at law, as against Walker and Grierson.

See *Bosanquet v. Ransford, public officer, &c.*, 11 Ad. & Ell. 520, S. C., 12 Ad. & Ell. 812; *Executors of Wright v. Nutt*, 1 T. R. 388.

1844.—Hughes v. Lipscombe.

*HUGHES v. LIPSCOMBE.

[*341]

1844: July 2, 6, 22, 24.

One of the several defendants, served with the subpoena to appear and answer, is, under the 16th Order of August, 1841, not bound to put in any answer to the bill, where he is not required to do so by the note inserted at the foot of the bill, under the 17th Order; but in default of answer by such a defendant within the time allowed for answering, the plaintiff may file a traversing note against him, under the 21st Order.

THE bill was against three defendants. The plaintiff required discovery from two of the defendants only, (as in Order XVII. of August, 1841), and the other defendant was not required in the note at the foot of the bill to answer any of the interrogatories. The subpoena to appear and answer in the usual form was served on all the three defendants. The defendant, who was not required in the note at the foot of the bill to answer any interrogatory put in no answer; and the time for answering having expired, the plaintiff proceeded to sue out an attachment against him, but the officer declined to seal it without the especial direction of the court.

Mr. *Freeling* applied for a direction to the officer to seal the attachment, and submitted that the Order XVI. of August, 1841, although it protected the defendant from exception to his answer, did not exempt him from the necessity of obeying the subpoena: *Wilson v. Jones*.(a) The answer had two significations, —one, that of defence, the other, that of discovery. Because the plaintiff did not require the assistance of the defendant to prove his case, it did not follow that he was not bound to answer, in order to substantiate the proceedings. The traversing note could not be filed until the time for answering had expired; (Order XXI. of August, 1841); and therefore, if the defendant was not bound to answer, the plaintiff was equally prevented from resorting to the traversing note. In *Emery v. Newson*.(b) it was held, that a traversing note could not be filed against an infant defendant.

(a) 12 Sim. 361.

(b) 10 Sim. 564.

1844.—Hughes v. Lipcombe.

[*342] *VICE-CHANCELLOR.—Prior to the orders of 26th August, 1841, a defendant in equity, served with a subpoena to appear to and answer the bill, was bound *prima facie* to answer every interrogatory in the bill: and also to answer every statement and charge in the bill, whether specially interrogated thereto, or not. The practice of the court, prior to those orders, was subject to this further inconvenience: a defendant who was ignorant of all the facts alleged in the bill had no direct means of submitting, without answering the bill, to such decree as the plaintiff might, by evidence, be able to prove himself entitled to, and the plaintiff had no means of putting the truth of the bill in issue without calling for an answer; and if he called for an answer, he subjected both himself and the defendant to the expense and inconvenience of an answer to the whole bill, although the interests of neither might require that any answer whatever should be filed. To remedy these inconveniences, the 16th, 17th, 18th, 19th, and 21st Orders of the 26th August, 1841, were passed. According to the practice introduced by these orders, a defendant cannot, without subjecting himself to the consequences of impertinence, unless specially interrogated, (in manner pointed out by the orders), answer any statement, charge, or interrogatory in the bill, only by stating his ignorance of the matter so stated, or charged. And after the time allowed a defendant to plead, answer, or demur, not demurring alone, to the bill, has expired, if the defendant has filed no plea, answer, or demurrer to the bill, the plaintiff, by filing a traversing note, may bring the cause to issue as completely as if the defendant had filed an answer, and the plaintiff had replied thereto, and served a subpoena to rejoin. And, if the case be one in which the interests of

[*343] the defendant do *not require that he should file an answer, the course pointed out by the 21st Order, is that which, in point of expense and convenience, is obviously best adapted to the interests of all parties.

In this case the plaintiff has not called upon or required the defendant to answer any statement, charge, or interrogatory in the bill. The time allowed the defendant to plead, answer, or demur, not demurring alone, has expired, and the defendant has not filed any plea, answer, or demurrer to the bill. The plaintiff

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has not thereupon filed a traversing note, but has required the record and writ clerk to seal an attachment against the defendant for not answering; and the record and writ clerk having refused so to do, I have been required to direct him to seal the attachment.

In the absence of authority I should have had no doubt upon the point. If the plaintiff in this case, for the mere purpose of getting his cause to issue, by means of a replication, instead of by a traversing note, had desired an answer, he might, in the first instance, have interrogated the defendant, "whether he did not claim some interest," or any other simple question. If, by mistake, he had omitted, in the first instance, so to interrogate the defendant, he might have amended his bill and supplied the deficiency. Or he might now, according to my view of the practice, file a traversing note, and thereby obtain, with the least expense, both of money any time, every advantage which a merely formal answer, followed by a replication, will give him. It was said, indeed, by Mr. Freeling, that a traversing note could not be filed; that, in this respect, it was like the case of an infant defendant, from whom an answer was always required. I do not agree that a traversing note cannot be filed in this case. If the defendant is not in default, an attachment cannot issue; and if he is in default *the traversing note may [*344] be filed. The right of the plaintiff to file the traversing note is incident to the same default, upon which alone the right to the attachment (if it exists) must be founded. By refusing the attachment, the plaintiff can lose nothing; for, if the defendant desires to say nothing about his own case, the attachment would extract from him nothing but some formal and immaterial statement. If a traversing note could not be filed in the case of an infant defendant, it proves that infants are not within the scope of the orders referred to; and if that be so, the old practice will of course apply in such cases. My observations are directed to those cases to which the orders apply.

It was further said, that, if I did not follow *Wilson v. Jones*, I should, in effect, disregard the well-established distinction between discovery and defence in one and the same answer,—the subpoena calling upon the defendant for both, and the bill dis-

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pensing only with the former. But to that the answer is, that the plaintiff has no interest in the defensive part of the answer, except in so far as an answer of some sort may be necessary to enable the plaintiff to prosecute his suit, by giving him something to reply to. The defence is exclusively for the defendant's use and benefit, and accordingly, where the bill is amended after answer, and does not call for an answer to the amendments, the defendant is allowed a certain time to consider whether he will put in an answer by way of defence, and if he do not, the plaintiff may reply to the old answer, and so prosecute his suit. To give him the same means of prosecuting his suit, without any answer, where neither the plaintiff nor the defendant desired an answer, was the purpose of the traversing note.

Upon the above view alone, I should be prepared to hold that an attachment would not issue; but another [*345] *observation arises. I do not say anything about the bill in this particular case, because the question before me is one of general practice, and it cannot be the duty of the officer charged with sealing attachments to read the bill. I will, therefore suppose a case in which the defendant is ignorant of the matters stated or charged in the bill, in which he has nothing to add to the case made by the bill, and in which, not being called upon for an answer, he has not filed one. In such a case, (and such cases are not uncommon) the answer must of necessity be impertinent under the 16th Order, or immaterial;—ought the orders of the court to be so construed as to allow the plaintiff in such a case to attach the defendant, in order only that the plaintiff may have a nominal answer to reply to, when, by filing his traversing note, the same end may be accomplished? My opinion is, that, according to a sound construction of the 16th, 17th, 18th, and 19th Orders of August, 1841, the obligation upon a defendant to answer the bill under the subpœna only, there being no interrogatories addressed to him, in manner required by the Orders in question, is taken away; that the defendant, in that case, has the option of not answering the bill; and that, if the plaintiff desires to proceed according to the old practice, instead of by filing a traversing note, he must, in the first instance, or by amending his bill, specially interrogate the defendant, in man-

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ner pointed out by the Orders of August, 1841 ; or fall back upon the Orders of August, 1841, and put the cause at issue, by means of a traversing note.

I have not been able to suggest to myself a single case, in which, by this construction of the Orders, the plaintiff, unless by his own default, can be prevented from conducting his cause in the way he thinks best. But any other construction would, in my judgment, be *productive of inconvenience, [*346] if not of injustice, to the defendant.

[His Honor then said, that, if he had adopted the view of the Order taken in *Wilson v. Jones* by the Vice-Chancellor of England, it would not have coincided with the opinion of another judge of the court ; and he, therefore, requested that the application might be made to the Lord Chancellor, that the rule of practice might be settled.]

July 22d and 24th.—Mr. *Freeling* made the application before the Lord Chancellor, when his lordship expressed an opinion, that the Order qualified, in effect, the language of the subpoena, so as to render an answer necessary only where the note called for it ; and that the case was one in which a traversing note could be filed ; but added that, as there was a difference of opinion, the question must not be considered as disposed of, until he had communicated with those judges of the court before whom the point had not yet been judicially brought. Subsequently, after having had such communication, the Lord Chancellor affirmed the above construction of the Orders.

 1844.—Tatam v. Williams.

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*TATAM v. WILLIAMS.

1844: February, 13th, 14th, 15th, and 16th, and March, 4th.

Bill by surviving partners, against the executors of a partner who had died thirteen years before the institution of the suit, for an account of the partnership dealings and transactions, charging that the deceased partner was indebted to the firm at the time of his death,—dismissed with costs, on the ground of the lapse of time, no new liabilities of the former partnership appearing to have arisen, or become known, after the death of the deceased partner.

By an agreement between some of the partners in a colliery, reciting, that it was apprehended it would be competent for one partner to determine the joint interest and bring the partnership property to sale, and that the death of any partner would have that effect; and that they were desirous that their interests should be so far several that the share of any partner should be transmissible to his representatives, and that the partnership interest should not be determined, and the entire property sold, without the consent of the majority in value, but each should be competent to sell his own share only; it was agreed that each of them should hold to himself, transmissible to his own representatives or assigns, an aliquot share of certain of the partnership property, and that their joint holding should not be subject to the ordinary terms applying to partnership property so as to entitle any one of them to a sale without the concurrence of such majority, or to dissolve the partnership, or so as to cause a total dissolution of partnership by the death of any one of them:

Held, that this was not an agreement by the parties that the representatives of a partner, after his death, should continue partners with the survivors, and contribute to the working of the colliery on their joint account; but was only an agreement that none of the partners or their representatives should be entitled to a sale of more than his own share of the partnership property.

The existence of a creditor's suit for the administration of the estate of a deceased debtor does not prevent the operation of the Statute of Limitations against a debt, in respect of which no claim is made under the decree, *semble*.

In suits by or against the assignees of a bankrupt, where the bankruptcy took place and the suit was instituted before the statute directing the appointment of official assignees, and no official assignee is a party to the suit,—at the hearing any of the parties are entitled to an inquiry whether an official assignee of the bankrupt's estate has been appointed.

In the year 1816, George Bowser, Thomas Foster, Charles Bonner, and Thomas Gaunt, were entitled, in equal shares, to the veins of coal under certain lands in Carmarthenshire; and also to shipping places for coal, sites of roads, and other premises, under leases or agreements for leases for several terms of years, granted or made by Lord Cawdor, Sir H. Owen, and the Earl of Ashburnham,—subject to rents and covenants. The shares

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of the partners (except Bower's) were also subject to an annuity to Stephen Pitt. By a deed dated the 2nd of December, 1816, Bowser, Foster, Bonner, and Gaunt, agreed that the collieries should be managed by Gaunt and Bowser, the younger, who should receive the profits; and, in case of their ceasing to manage the same, that other persons, to be chosen as thereby directed, should manage and work the collieries on behalf of the persons beneficially interested; and that, after paying certain specified charges, the profits should be divided between the said four parties in equal shares; and, in *case any one [*348] of them should acquire any interest in another colliery, the others were to have the option of sharing such interest with him. Considerable sums of money were laid out upon the tram-roads, shipping places, and premises; and on the 12th of January, 1819, Foster, Bonner, and Gaunt signed the following agreement:—

“Whereas the undersigned T. Foster, C. Bonner, and T. Gaunt are jointly, but as tenants in common, entitled, as lessees (or under an agreement for a lease) from the Earl of Ashburnham, to a harbor or shipping place, and certain sluices, railroads, lands, and premises, in the parish of Pembrey, in the county of Carmarthen: and whereas it is apprehended that the interest of the said parties in the premises is that of co-partners, and that, therefore, it would be competent for any one of them to determine the joint interest and bring the entire partnership property to sale; and that on the death of any one of them a dissolution of partnership, and consequent sale, would follow: and whereas the said parties are desirous that their interests should be so far several, that the share of any one of them shall be transmissible to his representatives or assigns, and that none of them shall be entitled, without the consent of the others, or a majority in value of the whole, to determine the partnership interest and bring the entire partnership property to sale, each of them and his representatives being competent to dispose only of his own peculiar share; now it is hereby mutually declared and agreed by and between the said parties respectively, that each of them shall hold to himself, transmissible to his own representatives or assigns, an equal third part or share of the aforesaid premises, and

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of any other premises to be acquired as after mentioned, and that their joint holding or interest (as partners in the profits) shall not be subject to the ordinary laws applying to [*349] partnership and partnership *property, so as to entitle any one of them, without the consent or concurrence of the others, or a majority in value of the whole, to dissolve the partnership, or so as to cause a dissolution of partnership by the death of any one of them. And, further, that it shall not be competent for any of them to incur any debt or raise any obligation binding upon the others or other beyond the ordinary expense of works and contracts made with the assent of all. And it is agreed that the covenant or agreement for a partnership of and in any mines, collieries, or other premises, which is contained in a certain deed, dated the 2nd of December, 1816, between the said parties and Mr. George Bowser, or a corresponding covenant and agreement, shall be adopted by the said above-named parties, Foster, Bonner, and Gaunt, upon the same terms and conditions as above mentioned or referred to, subject to such modification, for the better effectuating the intent and interests of the said parties, as counsel may advise; and also subject to proper provisions for raising the necessary funds for taking, opening, and working to profit, the mines, collieries, and other premises to be purchased, hired, or taken under such covenant or agreement."

- By an indenture of the 1st of February, 1819, Bowser, reserving certain rights or easements, relinquished to Foster, Bonner, and Gaunt his interest in an agreement for a lease of certain shipping places, roads, veins of coal, and premises, to be made by the Earl of Ashburnham to the four parties jointly. The Earl of Ashburnham demised the premises comprised in this agreement, to Foster, Bonner, and Gaunt, by two indentures, dated the 28th of February, 1820, for a term of sixty years.

On the 24th of September, 1819, an agreement was made between Foster, Bonner, and Gaunt, and John Calthrop, in [*350] consideration of 10,000*l.* *paid by him to Foster, Bonner, and Gaunt, became a partner with them in the said land, collieries, harbors, works, and premises; and it was agreed that each of them should have one-fourth part or share of the pro-

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duce, profits, and advantages of the same, and of the said covenant of partnership, from the 1st of October, 1819, subject to the incumbrances and charges thereon. By an agreement of similar form, dated the 14th of October, 1820, in consideration of 10,500*l.* and one-fifth of the monies expended on the works since the 15th of October, 1819, Thomas Pulvertoft became a partner with Foster, Bonner, Gaunt, and Calthrop, and it was agreed that each of them should be entitled to one-fifth of the same premises, and the profits thereof, subject to the like incumbrances and charges.

On the 11th of January, 1822, Foster, Bonner, Gaunt, Calthrop, and Pulvertoft, borrowed 10,000*l.* of C. Hill, and, by deed of that date, they assigned to him their interest in the premises demised to them by the Earl of Ashburnham, in the two indentures of the 28th of February, 1820, by way of mortgage, to secure the 10,000*l.* and interest. Foster died on the 10th of May, 1822; and his executors, Williams and Bonner, proved his will. In January, 1831, the mortgage of the premises to Hill was assigned to Jones and Waters, bankers of Carmarthen; and in May, 1831, Jones and Waters, in consideration of the absolute assignment to them of Foster's interest in the mortgaged property by his executors, released his estate from the mortgage debt and interest and the covenant for payment. In July, 1832, Jones and Waters became bankrupt; and Howell and Scott were appointed assignees of their estate.

The bill was filed on the 30th of June, 1835, by Tatam and Butters, assignees of the estate of Bonner (who had *become bankrupt,) and by Calthrop, Pulvertoft, and [*351] Gaunt,—against Williams and Bonner, as the executors of Foster,—Howell and Scott, as the assignees of Jones and Waters,—and the personal representatives of George Bowser; and the bill alleged that the whole of the sum of 10,000*l.* borrowed from C. Hill, upon mortgage of the partnership property, was received by Foster; that Foster laid out about 6000*l.* on partnership purposes, and that the other 4000*l.* remained in Foster's hands at the time of his death; that the works were continued by Bonner, Gaunt, Calthrop, and Pulvertoft until October, 1826, when Gaunt retired, indebted to the partnership; that the

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works were then continued by Bonner, Calthrop, and Pulvertoft until September, 1828, when Bonner became bankrupt. The bill prayed that an account might be taken of the dealings and transactions of the partnership between Bonner, Foster, Gaunt, Calthrop, Pulvertoft, and Bowser, and of the partnership property and effects; and that the partnership property and effects might be sold under the direction of the court, and the produce divided amongst and paid to the parties entitled to it; and that the personal estate of Foster might be declared liable to make good what should be found due from his estate to the partnership; and that such estate, and also the estate of Bowser, might be applied in due course of administration.

The defendants, the executors of Foster, admitted the partnership, and the several changes therein; but did not admit that Foster had retained the 4000*l.* in his hands, and denied that they, the executors, since the death of Foster, had done any act by which his estate could become or be continued liable in respect of the said partnership transactions; and they submitted that, after the time which had elapsed from the death of Foster until

the institution of the suit, his estate was not liable to account *or to any claim in respect of the said partnership [*352] dealings and transactions. They stated, moreover, that a suit had been instituted in Michaelmas Term, 1822, against them as such executors, for the administration of the estate of Foster, and that a decree had been made in such suit in May, 1824; that no claim had been made in that suit in respect of the partnership transactions in question, and that a report of debts was made in August, 1831, and the estate distributed. The defendants, the executors of Bowser, submitted, that Foster's executors were bound to account for the 4000*l.* The assignees of Jones and Waters said, that the lessor had recovered the mortgaged premises in ejectment, and they disclaimed.

Calthrop, Pulvertoft, and Gaunt afterwards became bankrupt, and their assignees were brought before the court by supplemental bill, and bill of revivor and supplement.

At the hearing, Mr. *Kenyon Parker*, and Mr. *Bacon*, for the defendants, the executors of Foster, objected that no official as-

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signees in the bankruptcies of Bonner, or Jones and Waters, were parties to the suit. The stat. 5 & 6 Vict. c. 122, ss. 48, 53, provided for the appointment of official assignees under country fiats, whether issued before or after the passing of that act. There was nothing before the court to show that such assignees had not been duly appointed.

Mr. *Walker*, for the plaintiffs.

The appointment of official assignees in existing fiats is not imperative. It is in the discretion of the commissioners: *Ex parte Joseph Bowker, &c.*(a) The act *relating [*353] to country fiats passed in 1842; nothing could therefore appear upon the pleadings with regard to the official assignees, and the court would not presume that any such official assignees had been appointed in these cases. There were, in fact, no assets to collect.

The VICE-CHANCELLOR said, that the appointment of an official assignee under the old fiats was discretionary, and the court was not to assume that such appointments were necessary in these cases. If the bill had been filed after the act extending to country bankruptcies had passed, the court would have required the official assignee to be a party, or his absence to be accounted for; but, as the bill had been filed before the act, the case might proceed, unless the parties could not agree upon the fact of whether there was or was not an official assignee of any of the estates of the bankrupts. In that case there might be an inquiry, at the request of any of the parties.

It was admitted by all parties that there was, in fact, no official assignee, and the case proceeded.

Mr. *Walker* and Mr. *Williams*, for the plaintiffs, insisted, first, that by the construction of the agreement of the 12th of January, 1819, the estate of Foster, after his decease, continued to be a partner in the collieries, and, therefore continued to be entitled

(a) 2 Mont. Dea. & De Gex, 324.

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and liable to account ; secondly, that the case, being one of merchants' accounts, was excepted from the Statute of Limitations ; and, thirdly, that the suit against the executors of Foster to administer his estate prevented the operation of the

[*354] *statute : *Sterndale v. Hankinson* ;(a) the advertisements for creditors would, also, take the case out of the statute : *Bailie v. Sibbald*.(b) The circumstance that the plaintiffs did not go in under the decree was of no importance, as they might go in at any time while there was outstanding estate. *Lashley v. Hogg* ;(c) and, especially, in this case, in which the claim was not an ordinary debt, but required a preliminary proceeding, by bill, or otherwise : *Paynter v. Houston*.(d) It was manifestly absurd to say that a surviving partner, continuing himself liable in respect of transactions begun in the lifetime of a deceased partner, was precluded, at the end of six years, from calling on the estate of the latter for contribution, merely because his death had put an end to the active account as between him and his surviving partner.

Mr. *Heathfield*, for the executors of Bowser.

Mr. *Metcalfe*, for Bonner, one of the executors of Foster.

Mr. *Shee*, for the surviving assignee of Jones and Waters.

Mr. *Kenyon Parker* and Mr. *Bacon*, for Williams, the other executor of Foster, contended, that the agreement of January, 1819, had not the effect attributed to it by the plaintiffs ; that the accounts between the estate of Foster and the surviving partners had terminated at his death ; and that any balance due on either side was not recoverable after six years from that cessation of the account,—at least, in the absence of any case showing that liabilities, not then known, had since arisen.

[*355] *VICE-CHANCELLOR.—Two questions were argued in this case ; first, whether the persons representing the es-

(a) 1 Sim. 399.

(b) 15 Ves 192.

(c) 11 Ves. 602.

(d) 3 Mer. 303.

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tate of Foster were to be considered as in partnership with the owners of the other portions of the colliery after Foster's death; and, secondly, whether, if that were excluded, the plaintiffs could now claim an account of the partnership transactions prior to Foster's death in 1822.

The argument in support of the affirmative of the first question depended wholly, as I understand, upon the effect to be given to the agreement of the 12th of January, 1819. For, it was not contended, nor could it with reason have been contended, that, in the absence of that agreement, there was anything in the relation of the parties which could have entitled the part-owners of the colliery, who survived Foster, to insist that his executors should continue to work the colliery, on joint account with them, after Foster's death. The agreement of the 2d of December, 1816, between Bowser, Foster, Bonner, and Gaunt, had only the effect of providing that the entire mine should be worked for the benefit of the beneficial owners, by agents appointed by all,—the only way in which a coal mine, belonging to several persons, can practically be worked: *Jeffreys v. Smith*.^(a) Then, as to the effect of the agreement of the 12th of January, 1819,—was that an absolute contract on the part of Foster, that he and his personal representatives should continue partners with the survivors, so as to be bound to work the colliery on joint account, and to contribute accordingly? Or was it not simply an agreement that the dissolution of the partnership, *by the death of any one of the three [*356] parties, should not entitle any one to call for a sale of more than his own interest? I think the latter was all that was meant, and that it is all that is expressed, and, consequently, that the onus is upon the plaintiffs to show that the executors of Foster, at his death, made themselves liable to contribute to the expenses of working the collieries.^(b) It is positively denied in these pleadings by the executors, that they ever did so; and no evidence is given to raise an inference that they ever interfered after Foster's death; and, if they did not, however they might be precluded from establishing, as plaintiffs in this court,

(a) 1 J. & W. 298.

(b) See 1 Haro, 360, 369.

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an interest in the past working of the mines, the plaintiffs in these causes cannot obtain relief against them in the case supposed: *Norway v. Roe*.^(a) And, even, if the construction of that agreement were otherwise, yet, adverting to the facts that it was not referred to in either of the subsequent agreements entered into on the admission of Calthrop and Pulvertoft, and that it was not brought forward or insisted upon until thirteen years afterwards, it may be doubtful whether this court would not presume that the agreement itself was abandoned, or at all events, refuse to enforce it. I am, therefore, of opinion that such account (if any) as the plaintiffs may eventually appear to be entitled to against the estate of Foster, must be confined to the dealings and transactions of the partnership prior to his death; and the only remaining question is, whether the plaintiffs are entitled to that account.

The answer of Foster's executors to this demand is founded wholly on the time which elapsed between Foster's death [*357] and the filing of the bill; viz. from the 10th of May, 1822, until the 30th June, 1835. I must, upon these pleadings and on the evidence, assume that Foster's executors have not, by any act of theirs, since his death, made themselves, or the estate of Foster, liable to this part of the plaintiff's demand. The estate of Foster was, undoubtedly, liable to this account at his death, and as clearly continued so for some period of time. The question is, how long it continued to be so liable by force of the original contract, and whether that liability existed at the time of filing the bill.

The question how long the estate of a deceased partner continues liable to the demands of surviving partners, is not, I apprehend, the subject of any positive statutory enactment, except so far as this court may found its rules upon analogous cases at law. The cases at law which appear to have been commonly argued upon in this court, as affording an analogy in questions between partner and partner after a dissolution of partnership, are those which fall within the exception as to merchants' accounts in the statute of limitations^(b) Now, notwithstanding

(a) 19 Ves. 144.

(b) 21 Jac. 1, c. 16, s. 3.

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the doubts which appear for a long time to have hung over the construction of that exception in the statute, I understand the rule at law now to be settled, that, if all dealings have ceased for more than six years, the statute (even between merchant and merchant, their factors and agents) is a bar to the whole demand, except where the proceeding is an action of account, or perhaps an action upon the case, for not accounting: *Inglis v. Haigh*,^(a) *Cottam v. Partridge*,^(b) in which cases the antecedent authorities are referred to. Upon the question whether one partner could, at law, maintain an action of account against his co-partner, I shall refer only to the very elaborate argument of Mr. *Hayes^(c) in *Cottam v. Partridge*. In this court [*358] there is direct and very high authority for the proposition that a court of equity will not, after six year's acquiescence unexplained by circumstances, or countervailed by acknowledgment, decree an account between a surviving partner and the estate of a deceased partner: *Barber v. Barber*,^(d) *Ault v. Goodrich*,^(e) *Bridges v. Mitchell*,^(f) (a case spoken of by Lord Eldon in *Foster v. Hodgson*^(g) as a case of authority,) to which may be added also the case of *Martin v. Heathcote*,^(h) and Lord Henley's note upon that case.⁽ⁱ⁾ The authority of the case of *Barber v. Barber*, and, consequently, the authority of the other cases is, without doubt, much shaken by the observations of Lord Brougham in moving the judgment of the House of Lords in the case of *Robinson v. Alexander*.^(k) For, notwithstanding Lord Cottenham's remark in *Mirehouse v. Scaife*,^(l) to the effect, that the judgment of the House of Lords in any given case does not involve an approbation of all the reasons which each peer may have given for his vote, so as to make those reasons binding upon courts of inferior jurisdiction, it is impossible not to defer to the opinion to which I have adverted, and, perhaps, difficult to explain the judgment of the House of Lords upon any other reasons, notwithstanding the special circumstances of that case. But Lord

(a) 8 Mees. & Wels. 769.

(b) 4 Man. & Gr. 271.

(c) 4 Man & Gr. 278.

(d) 18 Ves. 286.

(e) 4 Russ. 430.

(f) Gilb. Eq. Rep. 224; Bumb. 217; 15 Vin. Ab., tit. Limitation, E. 2, pl. 7, p. 110.

(g) 19 Ves. 185.

(h) 2 Eden, 169.

(i) Ib.

(k) 8 Bligh, N. S. 352; 3 Cl. & Fin. 717.

(l) 2 Myl. & Cr. 704.

1844.—Tatam v. Williams.

Brougham in that case acknowledged, in the clearest manner, that, whether by analogy to the statute, or for any reason, six years was or was not a bar in that case, it was the duty of a court of equity to consider whether, under circumstances of de-

lay, a decree should be made. In this case it is unnecessary that I should rely upon the *cases which have decided that this court will not give relief after six years of delay wholly unaccounted for, inasmuch as in this case it was not six years, but a clear period of thirteen years which elapsed between the death of Foster and the filing of the bill, and no excuse is given for that delay.

In addition to the delay which has occurred, it appears that in 1822, a bill was filed for the administration of the estate of Foster, a decree in the cause was made in 1824, and in 1831 there was a report of debts. In that suit, Bonner, one of the executors, who was also a surviving partner in the colliery, was a defendant. No claim in respect of the matters now in question appears to have been made in the suit in which the assets of Foster were in course of administration, and those assets have been distributed.

It was said, however, that, although the estate of Foster may not be liable in respect of any new transaction entered into after Foster's death, the contracts and other transactions of the partnership depending between them and third parties,—that is, contracts and other transactions of the partnership to which Foster was liable with his co-partners to strangers dealing with the firm,—may be shown by the plaintiffs not to have been wound up until a very recent time before filing the bill. But on this point it is sufficient to say that the bill makes no such case.

Bill dismissed with costs as against the executors of Foster.

It was admitted that the only object of the suit was the 4000*l.* charged to have been retained by Foster. No party desired a decree in respect of any other matter.

1844.—Fletcher v. Stevenson.

*FLETCHER v. STEVENSON.

[*360]

1844: January 20th, 22nd, 23rd, and Feb. 24th.

In an administration suit, it appeared that the testator and his surviving partners were lessees of certain iron works and premises for a term of years, of which eleven were unexpired, and, as such lessees, were subject to covenants for rent, repairs, insurance, &c.; and that, by the articles of partnership, the executors of a deceased partner might elect to become partners in the concern, or to withdraw the capital of the deceased therefrom:—*Held*, that, although the executors had elected not to become partners, and no breach of the covenants appeared to have happened, yet, as such covenants, if broken, might leave the estate of the testator liable to demands sufficient to absorb it, the interest as well as the principal of the residuary estate must be retained to answer any such possible demands, until the extent of the liability could be ascertained; or, if any part of the interest or income should be paid to the tenant for life, it could only be on security to refund the same, if required to satisfy any such future demand.

B. FLETCHER, by his will, dated in 1832, gave the plaintiff, his wife, a legacy of 25*l.*, to be paid on the day after his death, and directed his debts and funeral and testamentary expenses to be paid out of his personal estate, and charged his real estate with the deficiency (if any); and he gave the residue of his personal estate and all his real estate to trustees, upon trust, as to certain furniture and effects, to permit the plaintiff to use and enjoy the same for her life or widowhood; and as to the residue of such personal estate, to sell and dispose of such parts thereof as did not consist of money, and to invest the whole of such residuary personal estate as therein mentioned; and as to the real estate, upon trust, during the lifetime of his wife, to set, let, and manage the same, and receive the rents and profits thereof, and after applying a competent part in keeping the said real estate in repair, to pay and apply an annuity of 50*l.*, during the life of his wife, for the benefit of his niece Mary Fletcher, with remainder to her children, or as she should appoint. And the testator directed his trustees to pay and apply the residue of the rents, interest, dividends, and profits of his real and residuary personal estate to his wife for her life or widowhood; and if she married again, then upon trust to pay to her thereout an annuity of 10*l.* only; and from such her second marriage, upon trust to suffer the residue of the said annual income, after payment of the

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said annuities, to accumulate for the benefit of his estate during the lifetime of his *wife. And the testator directed his said trustees, after the decease of his wife, to sell the said real estate, and to stand possessed of the proceeds thereof, and the residuary personal estate, upon trust to pay 1000*l.*, part thereof, to his said niece, or her issue, if she should be dead, leaving issue, in manner therein mentioned; and as to the residue, upon trust to pay the same and all unapplied accumulations unto his sisters Eliza and Sarah, and his wife's brother John Price, as tenants in common. By a codicil made in 1840, the testator republished his will, and appointed another executor. The testator died in 1840. The bill was filed by the widow,—against the trustees and executors, the testator's niece and her children, and the three residuary legatees,—for the execution of the trusts of the will.

The executors by their answer stated, that, by an indenture of lease, dated the 1st of July, 1834, the Earl of Balcarras demised to the testator and four other persons, their executors and administrators, certain iron foundries, workshops, a fire-brick manufactory, wharf, coal basin, and other buildings, closes of land, and premises, situated in the county of Lancaster, together with steam-engines, bodies, cylinders, shafts, pipes, mill-gearing, thereon or attached thereto, for the term of twenty-one years, at the yearly rent of 1568*l.*; and the said testator, and the four other lessees thereby, among other things jointly and severally and for their several and respective heirs, executors, and administrators, covenanted with the said Earl and the reversioner for the time being to pay the said annual rent, and all taxes, rates and assessments, in respect of the said premises, and to repair the messuages, steam-engines, fixtures, and things, and to purchase and provide new engines, fixtures and things as the case might require, and to insure and keep insured during [*362] the term the messuages, buildings, and premises, against damage by fire, and, in case of such damage, to apply the moneys received by virtue of the policy of insurance as therein mentioned. And that it was thereby agreed, that, if one or two of the said lessees should die during the term, and his or their executors or administrators should within six months

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after such death, pay or tender to the earl, or the reversioner for the time being, 1000*l.*, then the said covenants and agreements on the part of each or either of such two lessees, whose executors or administrators should pay or tender such sum, should cease and determine, and all liability at law or in equity in respect of any future breach or non-performance thereof be absolutely released and discharged, but not so as to release or discharge the said surviving lessees, or the covenants and agreements on their parts and behalves. The executors further stated, that the testator and the other four lessees entered into partnership for the said term of twenty-one years in the trade of iron-founders, steam-engine makers, iron-forgers, and fire-brick makers; and by articles of partnership made between them, dated the 30th of May, 1235, option was given to the executors of a partner who should die, or any person or persons appointed by the deceased, to become a partner or partners for the residue of the term; or, if the executors or administrators of any one or two of the partners who should die within the first seventeen years should elect not to become such partner, they the executors or administrators of each such deceased partner should receive from the survivors the sum of 1000*l.*, and the interest of the deceased partner should cease and determine, and his share of the capital be paid out, as therein mentioned. The executors further stated, that J. F. Carwell, one of the four other lessees and partners, retired from the partnership, and by indenture, dated the 4th of July, 1838, conveyed and assigned all his *estate and interest in the hereditaments and pre- [*363] mises comprised in the said demise to the testator and the three continuing partners, their executors, administrators, and assigns, and the testator and the three continuing partners, for themselves, jointly and severally, and for their several and respective heirs, executors, administrators, covenanted with Carwell, his executors, administrators and assigns, to pay the rent and perform the covenants, and to indemnify him, his heirs, executors, and administrators, of and from all costs, charges, losses, damages, and expenses, which could or might arise from the non-payment or non-performance thereof. The executors also stated, that the testator, with the other continuing partners,

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carried on the partnership business until his death. The executors also stated, that they had elected to put an end to partnership, and had applied to the Earl of Balcarras and to Carwell to release the estate of the testator from the covenants; that the Earl was willing to receive the 1000*l.*, and to release the estate from its liabilities to him, but that Carwell refused to release the estate from any demand under the deed of indemnity; and that, in consequence of such refusal, and with the concurrence of the plaintiff, they had not thought it advisable to pay the 1000*l.* to the Earl; and they submitted, therefore, that the testator's estate, and themselves in respect thereof, remained liable to all the covenants and provisions of the lease.

The defendants, the residuary legatees, by their answers, submitted, that a part of the personal estate of the testator ought to be set apart to answer the contingent claims which might be made thereon.

1842: *June 18th.*—At the hearing of the cause, be-
[*364] sides the common *inquiries proper for the administration of the estate, special inquiries were directed with reference to the contingent liability referred to.

ORDERED, that the master inquire, &c., whether the testator's estate is or ought to be subject to any, and what liability, with respect to the lease of the 1st of July, 1834, or the articles of partnership of the 30th of May, 1835, or the partnership business carried on by the testator, or with respect to the indenture of the 4th of July, 1838, in the pleadings mentioned, and the particulars of such liability; and whether anything, and what, can be done with respect to such liability, or with respect to getting rid of or meeting or providing for the same. And the master is to ascertain, &c., whether or not the defendants (the executors) acted properly, under the circumstances, in electing not to become partners in the concern in the pleadings mentioned, and in electing not to take advantage of the proviso contained in the said indenture of lease, by which the heirs, executors, or administrators of any one or two of the lessees who should first die might, on payment or tender of the sum of 1000*l.*, become released and discharged from liability in respect of any future breach or non-performance of the covenants and agreements contained in the said lease.

1843: *Nov. 11th.*—The master stated the particulars of the real and personal estate of the testator, and that he had published the usual advertisements for creditors; but he did not find, that there was any debt of the testator remaining unsatisfied, no creditor having proved or claimed any debt before him. And,

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with reference to the above inquiry, the master stated the lease of the 1st of July, 1834, the partnership, and the execution of the articles of the 30th of May, 1835, the retirement of Carwell in 1838, and the assignment and indemnity of the 4th of June, 1838, as set forth in the answer. The master also proved, that the testator, until his death in 1840, continued the partnership business with the three other partners; that the Earl of Balcarras was willing to accept the 1000*l.*, and release *the testator's estate from the liabilities under the cove- [*365]nants in the lease, but that Carwell refused to release the testator's estate from any liabilities under the deed of indemnity, or to come to any agreement for that purpose, in consequence whereof the testator's estate would remain liable to all the covenants of the lease to which Carwell, his executors or administrators, was, or were, or should be liable; and he found, that the lease would expire by lapse of time in the year 1855, until which time the liabilities (if any) of the testator's estate under such lease, and indemnify to Carwell, could not be ascertained or liquidated,—that nothing could be done with respect to getting rid of, meeting, or providing for, such liabilities,—and that the executors acted properly, under the circumstances, in electing not to become partners in the concern, and not to take advantage of the provision in the lease, by paying 1000*l.* to the Earl of Balcarras.

The personal estate of the testator consisted of various specific articles which had not been converted, a sum of consols, standing in the names of the executors, and some cash in their hands. It was admitted that there was a possibility that breaches of covenants in the lease might happen, the amount of the liability in respect of which would be sufficient to exhaust the estate of the testator, even if it were accumulated until the expiration of the lease, at compound interest. At the hearing for further directions,

Mr. Romilly and Mr. Follett, for the plaintiff, the widow, claimed payment of the income of the residuary estate.—It might be true that the corpus of the residuary estate ought to be set apart to answer the contingent liabilities under the covenants,

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(*Simmons v. Bolland*, (a) *Hawkins v. Day*,) (b) but that
 [*366] rule did not apply to the "accruing interest to which the plaintiff had, under the will, a present right,—to which no present creditor had any claim,—and the payment whereof to the plaintiff would leave the whole residuary estate still untouched as a security to the creditor under the covenants, if any such creditor there should ever be. It was not the duty of an executor to accumulate interest for the benefit of creditors: if he made interest of the testator's estate in his hands, he might be charged with it; but if he chose to take the money, and lock it in a box, he would not, in an action at law either by a simple contract or specialty creditor, be charged with anything more than he had actually possessed. It was only in a court of equity that an executor was required to make interest of the fund confided to him. The liability under the covenants, if it ever arises, will be merely a legal demand; and if the creditor then has all that the law would have given him, he will have no ground of complaint merely because equity has not interfered to give him more. It has never been the rule or practice at law or in equity to preserve more than the corpus of the fund for the contingent creditor: this is seen by the security which is required from legatees to refund, if contingent liabilities should arise, as in *Simmons v. Bolland*, *Eeles v. Lambert*, (c) *Nector v. Gennet*. (d) There is no case in which that security has been required to extend beyond the amount of the legacy actually paid; but, according to the principle suggested by the executors and parties in remainder in this case, the security ought to extend to the repayment of the legacy with all intermediate interest and profits. The relative rights of the parties are these: the creditor is entitled to what the law would give him if he sued on the covenant; the tenant for life is entitled to the current income,
 [*367] keeping down the interest "of the existing debts that bear interest, (e) and to the income of the reduced fund after the debts are paid off; and the remainderman is entitled

(a) 3 Mer. 547.

(b) Ambl. 160; S. C., 3 Mer. 555, n.

(c) Cited, 3 Mer. 552.

(d) Cited, Ib.

(e) See *Faulkner v. Daniel*, ante, p. 199.

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to the corpus, at the expiration of the life estate, subject (as the tenant for life is) to the reduction of the amount of his fund when and as debts may arise. The fallacy in the argument for retaining the interest is, in assuming that state of things actually now to exist which may by possibility exist hereafter, and for which provision is to be made. The debts of the testator must be paid, but not before they are due. Until the debt arises, the will of the testator confers the only title. If the estate bears fruit, the disposition of the *usufruct* is governed by the will, until the moment that a paramount claim appears. The creditor, when he has established his demand, has a right to be satisfied out of the naked estate as it stood after all prior claims were satisfied. He is entitled to have the estate simply secured; he has no right to have it beneficially managed so as to make a profit upon it, and thereby to increase the assets. It is the inflexible rule of this court, not to interfere for that purpose on behalf of a creditor;(b)[1] still less will it so interfere on behalf of those who never may, and most probably never will, be creditors. Unless the interposition of the court was called for upon its ordinary principles, there will be no disposition to extend it where the effect would be to withhold from the widow of the testator her maintenance for at least eleven years, and probably during the whole of her life.

Mr. *Bourdillon*, for the defendant Mary Fletcher and her children, adopted a similar argument, deprecatory of the retention of the fund.

*Mr. *Tinney* and Mr. *Fleming*, for the defendants the [*368] sisters and brother-in-law of the testator, the residuary legatees in remainder.

(a) See *Collinson v. Ballard*, 2 Hare, 119.

[1] In the case of *Collinson v. Ballard*, 2 Hare, 119, it was held that inquiries of the propriety of the proceedings proposed to be taken for the beneficial management and restoration of the estate of a testator or intestate would not be directed in a creditor's suit.

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It is incorrect to describe the debt or liability under the covenants as contingent ; it is a present liability to a future debt,—there is only uncertainty in amount. Suppose the amount were now ascertained, but the time of payment would not arrive until ten years hence : could the tenant for life claim the income of the aggregate fund for the whole time that the payment was suspended ? or must not a fund, sufficient, with the interest which would accumulate upon it, to pay the debt when it becomes due, be separated from the corpus from the death of the testator ? Or, suppose a debt is due to the estate, and is not recovered for many years after the death of the testator : is not the tenant for life, or his representatives, entitled to interest on the fund so recovered ? Suppose a debt of the testator owing on a promissory note, payable at the end of two years, and the executor, on being allowed a discount, pays the debt immediately out of the estate in his hands : could the tenant for life impeach the anticipated payment as a breach of trust ? The question in this case, however, does not depend on that argument. The covenants are for the payment of rent at fixed times. The lessor may not sue the executors immediately upon the breach of covenant occurring : it is sufficient for him to sue within twenty years, and he may then recover not merely the rent in arrear, but the interest on the arrears ; (stat. 3 & 4 Will. 4, c. 42, s. 28 ;) and even according to the argument for the plaintiff, the tenant for life must bear that part of the claim. The proposition that a principal debt is to be paid out of the corpus, and interest out of interest, is untenable : it is a mode of administration which is impracticable. The simple question is, what is the residue of the estate ? Whether there is a tenant for life or not, the rule of administration is the same : the fund in either case must be impounded to answer the demands upon it.

Mr. *Spence* and Mr. *Bazalgette*, for the executors, controverted the proposition that the interest on the residue was not legal assets with which the executors would be charged. It was a part of the estate which came to the executors in right of their executorship, and for which they were accountable to creditors at law, and to the residuary legatees in this court.

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The other cases referred to in argument were *Manaton v. Manaton*,(a) *Howe v. Lord Dartmouth*,(b) *Pickering v. Pickering*,(c) *Vernon v. Earl of Egmont*,(d) *Antrobus v. Davison*,(e) *Earl of Shaftesbury v. Duke of Marlborough*,(f) *Thomas v. Montgomery*,(g) *Burles v. Popplewell*,(h) *Smith v. Day*,(i) *Harrison's case*,(k) *Gaunt v. Taylor*.(l)

February 26th.—VICE-CHANCELLOR:—The question in this case was, whether I should order the income of a sum of money now in the hands of executors, and stated to constitute the residuary estate of the testator in the cause, to be paid to the widow of the testator, who is tenant for life of his residuary estate; or whether that income as well as the capital must remain *in court as a provision against certain [*370] covenants not yet broken, (I assume that state of things, to try the question,) to which the testator's estate is liable,—liable primarily to the covenantee, the Earl of Balcarras, but liable only as surety as between the testator and his late partners.

If the widow could give security to the satisfaction of the court to refund the payments she asks to have made to her, or if the residue were of such an amount, with reference to the covenants referred to, that it could itself be reasonably considered a sufficient security for the possible demands to be made upon the estate, I should (so far at least as the Earl of Balcarras is concerned) have found little difficulty in acceding to the widow's application. For which *Hawkins v. Day*(m) and *Simmonds v. Bolland*(n) would be a sufficient sanction. But neither of these circumstances existing, as is admitted, in the present case, I am compelled to consider the case upon principle.

The widow's claim is opposed by two parties: first, by the executor, and, secondly, by the legatees in remainder. So far as the executor is personally concerned, he would, I apprehend, be safe in acting under the direction of the court; but, in con-

(a) 2 P. Wms. 234.

(b) 7 Ves. 138.

(c) 4 Myl. & Cr. 289.

(d) 1 Bligh, N. S., 554.

(e) 3 Mer. 581, per Sir W. Grant.

(f) 2 Myl. & K. 111.

(g) 1 R. & Myl. 729.

(h) 10 Sim. 383.

(i) 2 Mee. & Wels. 684.

(k) 6 Rep. 28 b.

(l) 2 Hare, 413.

(m) Amb. 160; S. C., 3 Mer. 355, n.

(n) 3 Mer. 547.

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sidering what degree of protection is due to the absent covenantee, I am bound to consider whether the court, taking the fund out of the hands of the executor, can do less than it would expect the executor to do if the fund remained in his hands. In his hands the fund has produced and is producing interest; and, if the court allows the fund to remain with the executor, it will continue to produce interest, of which the covenantee, in case of breach of covenant, will have the benefit. I am not, indeed, prepared to admit, that the court would not charge the executor with interest in favor of the covenantee, if he omitted, without reasonable cause, to make the residue productive, or paid the interest to a legatee, with notice of the covenants in question. I must repeat, however, that I am dealing with a case in which, *ex concessis*, the residue, as it now stands, cannot be represented in any sense as an adequate fund to meet the onerous covenants to which the estate of the testator is liable.

I feel bound to add, that, independently of the claim of the covenantee, I am not, as at present advised, prepared to reject the argument for the residuary legatee in remainder. The tenant for life is entitled to the income only of the true residue of the testator's estate. If the demands to which the estate of the testator may possibly be found liable (annually as well as occasionally) were certain though future, I am not prepared to say, that the present value of all those liabilities must not be ascertained in order to show what the true residue of the testator's estate is, upon the same principle upon which the court in favor of a tenant for life reduces future assets into possession at their present value. I cannot say, that, in favor of the remainderman, the court ought not to reduce the future liabilities of the estate into present value, in order to ascertain the true residue of the estate, which the tenant for life and the remainderman are to enjoy in succession. And, if that be so where the liabilities are certain, the court must equally do so, until the result is known, where, as in this case, no security can be given, and the funds are an inadequate security for the possible demands of the covenantee. It is only with the true residue I can deal, as between the tenant for life and remainderman.

 1844.—Taylor v. Earl of Harewood.

TAYLOR v. EARL OF HAREWOOD.*[*372]**

1844: March, 5th, and 6th, April, 19th, and May, 29th.

The testator bequeathed his residuary estate upon trust for his son for life, and after his decease for the children of his said son; and he directed, that, in case his said son should at any time thereafter come into the actual possession of an estate entailed upon him (the testator) and his issue by his late uncle R. D., of B., then and in such case the provision which he had thereinbefore made for his said son, and all and every the trusts thereof, should cease, determine, and be void, and the trustees should thenceforth stand possessed of the said trust monies for the benefit of his other children, exclusive of his said son. R. D., of B., the late uncle of the testator, had settled three estate to uses, which included, after several estates for life and in tail, a limitation in remainder to his nephew (the testator) for his life, with remainder to trustees upon trust to preserve contingent remainders, with remainder to the first and other son and sons of the body of his said nephew severally and successively in tail male, with divers remainders over. Before the date of the will, a tenant in tail, who had the then first expectant estate tail, joined with the first tenant for life in a recovery, whereby such tenant in tail had acquired the fee as to one of the three estates; but whether that fact was known to the testator, did not appear. After the death of the testator the same tenant in tail came into possession of the property, and suffered recoveries, whereby the entail as to the two remaining estates was barred; and he then devised the three estates to the son of the testator in fee, subject to certain charges, under which devise the said son afterwards entered into possession of the same three estates:—*Held*, that the possession thus acquired was not an actual possession of the estate entailed upon the testator and his issue within the meaning of the will.

By a settlement made in 1765 on the marriage of Robert Davison with Ann Chetwode, the manor or lordship of Brand, and the messuage called Brand Hall, and the demesne lands thereto belonging, situated in Norton-in-Hales, in the county of Salop, (described in the cause as “the Brand estate,”) a messuage and lands in the township of Betton, (called “the Betton estate,”) and a messuage and lands in the parish of Malpas and county of Flint, (called “the Maes-y-Groes estate,”) were settled to the use of Robert Davison, the husband and settlor, for life with remainder, as to “the Brand estate,” to Ann his wife, for her life, as part of her jointure; and as to all the other hereditaments, subject to an annuity of 300*l.*, to the wife; and as to the whole, subject to the said uses and annuity, to the use of the first and other sons of the marriage and their issue successively

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in tail male, with remainder to the use of the husband, his heirs and assigns for ever. Robert Davison, the husband and settlor, by his will, dated in 1769, in case of his own death without issue, as therein-mentioned, gave all his estate, both real and personal, subject to his debts and legacies, to his wife [*373] for life, with remainder to trustees *to preserve contingent remainders; and after the decease of his wife, to a trustee therein named, upon trust to raise 1200*l.* for certain persons therein named; and subject thereto, he gave the same estates unto his brother William for his life, remainder to trustees to preserve &c., with remainder to his nephew William Holt Davison, the son of his brother William, during his life, remainder to trustees to preserve &c., with remainder to the first and other son and sons of William Holt Davison successively in tail male, with remainder to his brother Samuel for life, remainder to trustees to preserve &c., with remainder to the first and other son and sons of Samuel successively in tail male, with remainder to his nephew Robert Davison (the testator, the construction of whose will was the subject of this cause) for life, remainder to trustees to preserve &c., with remainder to the first and other sons of his said nephew Robert Davison successively in tail male, with divers remainders over. Robert Davison, the husband and settlor, died in 1772, without issue, leaving his wife Ann (afterwards the wife of Edward Mainwaring) surviving. William Holt Davison, the nephew, died in 1791, leaving two sons, one of whom, William Holt Davison the younger, attained the age of twenty-one years. Samuel, the brother, died without issue male in 1770. In March, 1806, Ann, then the wife of Edward Mainwaring, joined with William Holt Davison the younger in suffering a recovery of the Betton estate, and in declaring the uses thereof to Ann Mainwaring for life, remainder as William Holt Davison the younger should appoint, and subject to such appointment to the use of William Holt Davison the younger for his life, remainder to uses to bar dower, remainder to William Holt Davison the younger, his heirs and assigns for ever.

In this situation of the uses and possession of the [*374] *estates, Robert Davison, the nephew, the testator in the

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cause, by his will, dated in 1810, devised and bequeathed his real and personal estate to trustees for sale, and to convert into money such parts as did not consist of money, and after payment of his debts, funeral and testamentary expenses, and a legacy, to invest the residue, and pay the interest and dividends to his wife for her life, and after her decease, upon trust, as to a certain part of the said trust monies, for the children of his son-in-law Henry Jones, and Ann his wife; and as to 2000*l.*, other part of the trust monies, for his daughter Diana for life, with remainder to her children; and in case of her death without issue, as therein mentioned, then upon trust to pay and apply the interest of the 2000*l.* equally unto and among such of the children of the testator as should be then living, and the survivors and survivor of them, until none of his said children should be living without having issue of his, her, or their body or bodies, or children of such issue, and then to divide the said 2000*l.* equally among the issue of his children, and the children of such issue per capita. And as to such part of the trust monies as should be sufficient for that purpose, upon trust to pay an annuity of 130*l.* to his daughter Mary for her life, if she continued unmarried, but, upon her marriage, 30*l.* thereof to cease, and the principal to sink into the residue; and after the decease of his daughter Mary, upon trust to pay and divide 2000*l.* amongst her children or their issue, subject to the same trusts and provisos as were declared with respect to the foregoing legacy to his daughter Diana; and if his daughter Mary died without leaving issue as therein mentioned, then upon trust to pay the interest of 1000*l.*, part of the said sum of 2000*l.*, to his son Daniel Wilson Davison for life, with remainder to his children and their issue, subject to the same trusts and provisos as were declared with respect to the legacy to Diana. And as to 508*l.* *one moiety of the remainder of the said 2000*l.*, [*375] upon trust for the children and issue of his late son-in-law Henry Jones, and Ann his wife; and as to 500*l.*, the other moiety thereof, upon trust for the children and issue of his daughter Diana, subject respectively to the same trusts and provisos as are declared of the said former bequests; and as to such part of the trust monies as should be sufficient, to pay an annuity of

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70*l.* to his daughter Jane Davies for her life, and in case of her surviving Mary, then a further annuity of 30*l.* for her life; and after the decease of his daughter Jane, upon trust to pay and divide 1500*l.* amongst her children or their issue, subject to the trusts and provisoes declared of the preceding legacies. And after investing such monies as should be necessary for the said purposes, the testator directed his trustees to stand possessed of the residue of the said trust monies, upon trust to pay the annual interest thereof to his son Daniel Wilson Davison and his assigns for his life; and after his decease, to pay and divide such residue unto and amongst his children and their issue, subject to the like trusts and provisoes. Then followed this clause, which gave rise to the principal question in the cause:—

“Provided always, and my will and mind further is, and I do hereby declare and direct, that in case my said son Daniel Wilson Davison shall at any time hereafter come into the actual possession of an estate entailed upon me and my issue by my late uncle Robert Davison, of Brand, in the county of Salop, Esq., then and in such case the provision which I have hereinbefore made for my said son, and all and every the trusts thereof hereinbefore contained, shall cease, determine, and be void to all intents and purposes; and that then and from thenceforth

my said trustees, and the survivors and survivor of them, [*376] or the executors or administrators of *such survivor, shall stand and be possessed of the said trust monies hereinbefore given to or in favor of my said son Daniel Wilson Davison, and his issue as aforesaid, upon trust to pay and divide the same unto and equally amongst all and every my children, except my said son, who shall be then living and the lawful issue of such of them as may be then dead, (share and share alike,) at such times and in such manner, and subject to such and the like trusts as are hereinbefore expressed and declared with respect to the original portions or fortunes of my said children or their issue respectively, and that in as ample and beneficial a manner, to all intents and purposes, as if all such trusts were here repeated and set forth, or such of them as are existing, or capable of being performed or taking effect.”

The testator Robert Davison, the nephew, died in August,

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1810, leaving his son Daniel Wilson Davison, his daughters Diana, Mary, and Jane, and several children of his daughter Ann, surviving.

Ann Mainwaring died in 1816, and thereupon William Holt Davison the younger came into possession of the three estates, and in Easter Term of that year he suffered a common recovery of the Brand estate, and by indentures, dated in May of the same year, such recovery was declared to be to the use of such person or persons, and for such estates, trusts, or purposes, as William Holt Davison the younger should appoint, and subject thereto to the like subsequent uses as had been declared of the recovery of the Betton estate in 1806. At the Spring Great Sessions for Flint, in 1816, a recovery of the Maes-y-Groes estate was also suffered to the same uses as had been declared of the Brand estate.

William Holt Davison the younger, by his will, dated *in November, 1824, after directing his debts to be paid, [*377] gave to his aunt Barbara an annuity of 200*l.* for her life, charged on all his real and personal estate, with power of entry and distress to compel payment thereof: he also gave an annuity of 10*l.* to a servant of his said aunt, charged on the same estates, with like powers. And after giving some legacies out of his personal estate, he gave, devised, and bequeathed unto his cousin Daniel Wilson Davison, (the son of the testator Robert, the nephew,) his heirs, executors, administrators, and assigns, according to the nature thereof respectively, the said Brand estate, and all his freehold and leasehold lands and hereditaments, and all his personal estate and effects; (subject to and charged with the payment of the annuities and legacies as aforesaid;) and he thereby expressed his wish and desire to be, that his said cousin should reside at the Brand, and that the plate, pictures, books, and other valuables in the mansion-house should not be sold or disposed of, but be held and enjoyed with the same; and he appointed Daniel Wilson Davison sole executor of his will. William Holt Davison the younger died shortly after making his will, in the same month of November; and Daniel Wilson Davison thereupon entered into possession and receipt of the rents

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and profits of the estates devised to him by such will. Daniel Wilson Davison died in 1836.

The bill was filed by the children of Ann, the daughter of the testator Robert Davison, the nephew, against the trustees, the children and representatives of Daniel Wilson Davison, (the surviving daughters of the testator being also defendants,) for the execution of the trusts of the will, submitting, that, inasmuch as Daniel Wilson Davison had acquired the actual possession of the Brand estate, the event had arisen upon which the provision made for him by the will was to cease, and the [*378] other *children were thenceforth entitled to the benefit of such bequests. The children and representatives of Daniel Wilson Davison insisted that his possession, by virtue of the will of William Holt Davison the younger, was not within the construction of the will of the testator in the cause, an event upon which the limitation over would take effect. At the hearing inquiries were directed, under which the Master reported the facts, (as contained in the foregoing statement,) and found, that, in 1806, the estate tail in the Betton estate was barred by the recovery of that date, and the uses thereof were declared as above stated; and that, at the date of the will and death of Robert Davison, the nephew and testator in the cause, the estate tail created in the Brand estate and the Maes-y-Groes estate by the will of Robert Davison (the settlor) was still subsisting; and upon the determination of the life estate of Ann his widow, by her death, in February, 1816, the uses limited by the indenture of the 29th of March, 1806, to or in favor of William Holt Davison the younger in the Betton estate, took effect in possession; and that the estate tail in the Brand and Maes-y-Groes estates at the same time fell into the possession of William Holt Davison the younger, as tenant in tail; and that by the recoveries suffered in 1816 of the Brand estate and the Maes-y-Groes estate, by William Holt Davison the younger, he acquired a full power of disposing of the fee-simple thereof; and that he did, by his will dated in November, 1824, devise the last-mentioned estates, and also the Betton estate, as above stated. And he found, that, upon the death of William Holt Davison the younger, in November, 1824, Daniel Wilson Davison did, as such devisee, and at such

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time, and by such title, and for such interest, and under such circumstances as aforesaid, come into the actual possession of the estate entailed upon Robert Davison the nephew, the testator *in the cause, and his issue, by his late uncle [*379] Robert Davison the settlor.

The parties claiming under Daniel Wilson Davison excepted to the last-mentioned finding of the Master. The cause came on upon the exceptions, and also upon further directions.

Mr. Romilly, Mr. Webster, and Mr. Cantrell, in support of the exceptions, argued that the acquisition by Daniel Wilson Davison of the estates devised to him by the will of William Holt Davison the younger was not that possession of the entailed estate upon which the interest of Daniel Wilson Davison, under the will of his father, the testator in the cause, was given over to the other children. He took a different estate and interest from that which he would have derived under the entail. The estate, moreover, devised to him, was charged with annuities, and it was not therefore the whole estate which the testator, his father, contemplated in the clause in question: *Fazakerly v. Ford*.(a) The title and event by which the devisee acquired this estate was as distinct from that referred to in the shifting clause as it would have been if Daniel Wilson Davison had purchased the estate, in which case it could scarcely be argued that his interest under his father's will would thereupon cease: *Tayleur v. Dickenson*,(b) *Spencer v. Spencer*,(c) *Peacocke v. Pares*,(d) *Harrison v. Foreman*,(e) *Doe dem. Lean v. Lean*,(f) *Earl of Scarborough v. Savile*,(g) *Driver v. Frank*,(h) *Saville v. Saville*,(i) *Burchett v. Woodward*,(k) [*380] *Thornhill v. Hall*,(l) *Morrice v. Langham*.(m) There was nothing of the nature of election in this case. If Daniel Wilson Davison had declined to take the estate devised to him

(a) 4 Sim. 390; 1 Add. & Ell. 897, S. C.

(b) 1 Russ. 521.

(c) 8 Sim. 87.

(d) 2 Keen, 689.

(e) 5 Ves. 207.

(f) 1 Add. & Ell. Q. B. Rep. 229.

(g) 3 Add. & Ell. 897, 962.

(h) 6 Price, 41; 3 Mau. & Sel. 25; 8 Taunt. 468, S. C.

(i) 2 Atk. 458.

(k) T. & R. 442.

(l) 2 Cl. & Fin. 22.

(m) 11 Sim. 260; 8 Moo. & Wels. 194.

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by William Holt Davison the younger, the other children of the testator in the cause would not have taken that estate.

Mr. *Tinney*, Mr. *Walker*, Mr. *Stinton*, and Mr. *Rolt*, for the plaintiffs, and the defendants interested in supporting the same construction, contended that the possession of the devised estate by Daniel Wilson Davison was an event upon which the provision made for him by the testator was given over to the other children. It was not material that he did not actually acquire the estate by force of the entail. The estate was the corpus or subject upon which the limitation over depended, without reference to the title under which the estate should be derived. The reference to the entail of the estate was not to indicate any particular title as that which alone was to have the effect of determining the beneficial interest of Daniel Wilson Davison in the estate of his father, but merely for the purpose of description, and in order to distinguish the particular property to which the testator referred. It was not necessary to insist that a possession of the estate as a purchaser for value, or as a creditor, would satisfy the words of the will, although even in that case, it might be said that it was the folly of the party to take a possession to which such consequences were attached. The description of the

entailed estate could not be taken in its strict sense, as im-
 [*381] porting a then existing limitation ; for the entail of *the

Betton estate, part of the property referred to by the testator was then barred, and his son could not therefore have afterwards taken that estate by force of the original entail : it necessarily followed that the reference to the entail must be taken not in its technical sense, but in some popular or qualified meaning, as pointing to an estate which had been the subject of an entail, and the limitations whereof had been or might be kept on foot or preserved by similar instruments. In this vulgar and not incorrect signification, the barring of an entail, and resettling the property upon like uses, embracing issue not within the former limitations, or not therein taking vested remainders, was looked upon as in truth upholding, and not destroying the entail.

VICE-CHANCELLOR :—According to the limitations in the will

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of Robert, (the settlor,) and if no recovery had been suffered of any part of the estates settled by his will, Daniel William Davison might, (though it was not certain that he would,) by force of the limitations contained in that will, have come into the actual possession of those estates; but at the time of making the will of Robert, (the testator,) in 1810, it was uncertain whether those estates would come to Daniel Wilson Davison, or not; and I shall therefore first consider the case as if no recovery had been suffered of the Betton estate prior to the will of Robert, (the testator,) and as if that estate, as well as the Brand and Maes-y-groes estates, had been subject to the limitations contained in the will of Robert, (the settlor,) at the date of the will of Robert (the testator;) and in doing this I shall (for the sake of the argument) lay out of the case the question suggested at the bar, whether my conclusion ought to be affected by the circumstance, (if it can be established,) that the estates are subject to some charge or incumbrance *under the will of William Holt [*382] Davison, dated in 1824, a state of circumstances in which *Fazakerley v. Ford*(a) would be a material authority.

Two constructions of the will of Robert (the testator,) were suggested. One (that contended for by the representatives of Daniel Wilson Davison) was, that the will should be read as if it contained the words, “by force of the limitations contained in the will of Robert, (the settlor;”) in which case the entire clause would stand thus: “Provided always, and my will and mind further is, and I hereby declare and direct, that, in case my said son Daniel Wilson Davison shall at any time hereafter come into the actual possession of an estate entailed upon me and my issue by my late uncle, Robert Davison, by force of the limitations contained in the will of my said uncle, then,” &c. The other construction, namely, that contended for by the younger children of Robert, (the testator,) was, that I should read the will as not speaking specifically of a possession to be acquired by force of the limitations contained in the will of Robert, (the settlor,) or under any other title in particular,—the title being, as they say, not of the essence of the condition.

(a) 4 Sim. 390.

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Now, upon the assumption that no recovery had been suffered of any of the estates, and that the limitations in the will of Robert (the settlor) remained in operation in November, 1810, the date of the will of Robert, (the testator,) I cannot raise a doubt in my own mind as to what the construction of the will should be. I agree, that the words "an estate" are to be read as describing the corpus or subject-matter of the devise; and I agree, that the words "entailed upon me and my issue by my late [*383] *uncle, Robert Davison," are capable of the construction contended for by the younger children of Robert, (the testator;) that is, that they might be construed as a description merely of the subject-matter of the devise, and not as necessarily expressing the subsisting limitations. But is that the natural import of the words? I think not. I think the words, according to their natural import, refer to limitations known or supposed by the party who uses them to be still subsisting; and, consequently, (for that, I think, is an unavoidable consequence,) that the will must *prima facie* be read in the way contended for by Daniel Wilson Davison; not, however, by actual interpolating words into the will, but by giving the words found in the will their natural operation. The suggested interpolation, as I read the will, adds other words, but without adding anything to the effect of the will. This construction, moreover, is strongly recommended by reason and probability. A man who knows that an estate stands limited to himself and his descendants, so that his eldest son may or may not become entitled to it under existing limitations, may reasonably enough make a provision in his own will contingent upon his son becoming entitled to such settled estate; and the same observation may perhaps apply to a case in which a parent has special grounds—as the existence of known affection, or a declared intention—for expecting that one of his children may come into the possession of an estate not actually settled upon him. But, as an abstract proposition, I cannot well conceive anything more irrational or improbable than that a testator should make the provisions of his own will contingent upon one of his children becoming entitled to an estate not settled upon him, and which the testator has no reason—such as I have supposed—for expecting that his child will

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ever become entitled to. But the strength of the argument for the construction which is favorable to the estate of Daniel Wilson Davison, *is not entirely seen until the dif- [*384] ficulties of the opposite construction, as well as the improbability of it, to which I have adverted, are taken into account.

It was of necessity admitted at the bar, that the words "come into actual possession" could not be read in their full and comprehensive sense. An actual possession by purchase for value,—by a mortgage from the owner,—as tenant from year to year, or as lessee for years rendering rent,—as judgment creditor, and tenant by elegit,—these and various other cases were put at the bar as cases in which Daniel Wilson Davison might be in the actual possession of the estate, and yet not in such possession as was required by the will of Robert, (the testator,) in order to produce the effect thereby prescribed. But these considerations, it was said, by no means lead to the conclusion that the possession contemplated by the testator necessarily meant a possession by force of the limitations in the will of Robert, (the settlor.) It was said, and truly, that estates tail are often barred, not for the purpose of destroying, but of perpetuating an old settlement, by resettling the estate; and it was asked, whether, in such a case, it would be held that Daniel Wilson Davison was not in "actual possession" within the meaning of the will, only because the original limitations had been superseded by others avowedly made for the purpose of perpetuating the former. I shall give no opinion here, whether, in the case of a clause like that in question, and of an estate tail barred and simultaneously renewed as part of one transaction, the estate being ultimately undiminished in quantity, and unimpaired in value, the court would or would not consider the new limitations as a continuance of the old: that is not the case before me. In this case William Holt Davison acquired an estate in fee-simple in the whole property, and by his will asserted the most absolute dominion over it, by the charges to which *he subjected it, [*385] and which by possibility might have exhausted the entire property. It is impossible to treat the transaction as made with reference to the old limitations. He gives Daniel Wilson

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Davison an estate not like that under the first will, but a fee ; and I cannot, in principle, hold that an actual possession by purchase for value, by Daniel Wilson Davison, would not be an actual possession within the will, and at the same time hold that an actual possession by devise from a stranger, who was a purchaser for value, would be in a different position ; or, by parity of reasoning, that an actual possession by a devise in fee-simple, after a recovery, would not be attended with the same consequences with reference to the provision in question. Two constructions are proposed : one rational and probable, consistent with the words of the will, and, I incline to say, required by them, without adverting to the difficulties of any other suggested construction ; the other, replete with difficulties, and for that reason making the former the more probable, if it be not the natural construction of the words.

It was, however, said, that the extrinsic facts excluded the construction contended for by Daniel Wilson Davison ; that the recovery suffered in 1806 of the Betton estate made it impossible, at the date of the testator's will, in 1810, that that estate could ever come into the actual possession of Daniel Wilson Davison by force of the limitations created by the will of Robert, (the settlor ;) that the limitations could not therefore take effect as to the whole of the estates entailed upon the testator and his issue ; and that that construction, being necessarily excluded as to part of the estates, must also be excluded as to the rest of them ; and that the words of the clause must be modified so as to make them reasonable in a sense other than that of referring [*386] to the old *limitations. But I think the reasons I have already given exclude this argument. The argument supposes Robert Davison (the testator) to have had actual notice of the fact that a recovery had been suffered of the Betton estate ; but there is no ground to presume that he was aware of that fact ; on the contrary, the words, as I have already said, appear to me, according to their natural import, to suppose and speak of the old limitations as still subsisting. I think that is the natural effect of the language of the will, and, unless I have something before me to exclude that meaning, I think I am bound to adopt it.

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DECLARE, that the testator's son Daniel Wilson Davison did not at any time after the date of the will of the said testator come into the actual possession of an estate entailed upon him, the said testator, and his issue, by his late uncle Robert Davison, of Brand, in the county of Salop, esquire, within the intent and meaning of the said testator's will. And, it appearing upon the Master's report that the testator's daughter Mary died without issue, declare, that the legacy of 1000*l.* to the testator's son Daniel William Davison, and his children and issue, and the legacy of 500*l.* to the children and issue of the testator's son-in-law Henry Jones, and Ann, his wife, and the legacy of 500*l.* to the testator's daughter Diana Mackenzie, and her children and issue, thereupon took effect. * * * * * And declare, that, subject to the life estate of the said testator's widow therein, the said Daniel Wilson Davison was entitled to the interest of all the residue and remainder of the trust monies in the said testator's will mentioned, for his life; and that, upon his decease, his children then living became entitled to such trust monies, in equal shares, subject to the provisos in the said testator's will.*

* The court made no order on the exceptions, (see 1 Hare, 578, n.) but directed the deposit to be returned.

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1844: March 22nd and 23rd.

A bill for a partnership account and a receiver, during the existence of the partnership, is not demurrable merely on the ground that a dissolution is not prayed; and, therefore, where, to a bill by one partner against another, alleging that the defendant, by conducting himself in violation of the partnership contract, excluding the plaintiff, and applying the assets to his own use, sought to force the plaintiff to dissolve the partnership before the end of the term, and praying an account of the partnership transactions and a receiver, but no dissolution, the defendant answered one interrogatory, and, submitting that the bill was demurrable, declined, under the 38th Order of August, 1841, to answer the remainder,—exceptions for insufficiency were allowed and sustained.

THE bill alleged that the plaintiff and defendant, on the 1st of January, 1840, entered into partnership as attornies, solieitors, and conveyancers, for a term of two years, under articles, whereby it was agreed, that, in consideration of 700*l.* then paid, and of a further sum of 700*l.* to be paid to the defendant by the plaintiff at the expiration of the term, the defendant and the plaintiff should be jointly interested in the business until the 31st

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of December, 1841; and that they should contribute in equal shares to the capital and expenses of the concern, and divide the profits equally; and that at the end of the two years the defendant should retire, and yield up the business, offices, and certain appointments which he held, to the plaintiff, who should thenceforth carry on the same on his sole account, in his sole name, and for his own profit; that the partnership business was carried on under the articles until April, 1842, the defendant not having retired from the partnership as he ought to have done; that, in April, 1842, the defendant induced the plaintiff to enter into articles of partnership for a further term of five years, and by such new articles, reciting the previous partnership agreement, and continuing most of its provisions, it was agreed that the defendant, at the expiration of five years, should retire from the business and offices, and deliver up the same to the plaintiff, who should then succeed to them, and thereupon pay the 700*l.* to the defendant; and that, in the event of the defendant being unable to procure the plaintiff the appointment to such offices, he should hold them for their mutual benefit. The bill alleged that the extension of the term was procured by the defendant with the view of so conducting himself, in the course of

[*388] *such extended term, as to compel the plaintiff to seek for a dissolution of the partnership, and by that means to leave the defendant in the sole possession of the business, appointments, and offices; and it alleged that the accounts were made up to the 30th of April, 1842, and the plaintiff had frequently requested the defendant to concur with him in making up the books of the partnership since that time, but the defendant refused to do so, in order to drive the plaintiff to a dissolution of the partnership, and to determine the provisions by which the defendant was bound: that the plaintiff had kept proper accounts of his receipts, payments, and dealings on account of the partnership, but that the defendant had not kept any such accounts since the said date, or that, if he had, he had concealed them, and absolutely refused to allow the plaintiff to inspect them, in consequence of which the plaintiff had been prevented from making out proper bills of costs for the business transacted by the said co-partnership; that the defendant, since the month

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of April, 1842, had done much business and received considerable sums of money on account of the partnership, and of the said appointments, which he had refused to give any account of, and that he had applied such monies to his own use; that he continued to exclude the plaintiff from all knowledge and control over the business, and had repeatedly expressed a determination to bring about a dissolution; and, that, by the means aforesaid, and by frequently using violent and insulting language to the plaintiff, the defendant endeavored to compel the plaintiff to seek for or consent to such dissolution.

The bill prayed that an account might be taken of the co-partnership dealings and transactions from the date of the last settlement thereof, and also an account of the monies received and paid by the plaintiff and defendant *respec- [*389] tively in respect thereof, and of all the receipts and payments of the said defendant in respect of the said offices and appointments which ought to have been brought into the said co-partnership account, the plaintiff thereby offering to account for the partnership dealings and transactions which had been carried on by him, and his receipts in respect thereof; and that a fair and proper division of the profits made by the co-partnership from the 1st of January, 1840, might be made between the plaintiff and defendant, not disturbing or varying the accounts so made up as aforesaid; and that the defendant might be directed to pay to the plaintiff what, upon the taking of such accounts, should appear to be due to him, and that (if necessary) some proper person or persons might be appointed to receive, collect, and get in the debts of the said co-partnership.

The answer of the defendant admitted the first partnership for the term of two years, and the articles upon which it was founded, and submitted that the bill was demurrable, and that, under Order XXXVIII of August, 1841, the defendant was not bound to answer further. The plaintiff took exceptions for insufficiency, which were allowed by the master. On exceptions to the Master's Report,

Mr. *Kenyon Parker*, and Mr. *Shee*, for the defendant, in support of the exceptions to the master's report, argued, first, that the

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bill was demurrable as seeking a partnership account, and yet not praying a dissolution of the partnership: *Loscombe v. Russell*,^(a) *Waters v. Taylor*,^(b) *Forman v. Homfray*,^(c) *Goodman v. Whitcomb*,^(d) *Chapman v. Beach*,^(e) *Marshall v. Colman*,^(f) **Vansandan v. Moore*,^(g) *Pigott v. Bagley*,^(h) *Knebell v. White*.⁽ⁱ⁾ And, secondly, that, the bill being open to a general demurrer, the defendant might, under the 38th Order, by answer, decline to answer either the whole or any portion of the interrogatories: *Tipping v. Clarke*,^(k) *Drake v. Drake*.^(l)

Mr. *Romilly*, and Mr. *Glasse*, for the plaintiff, in support of the master's certificate of insufficiency.

In the recent case of *Miles v. Thomas*,^(m) the Vice-Chancellor of England expressed his opinion to be, that the court ought to interfere in partnership cases, though no dissolution was prayed, if the object of the suit was to protect the partnership property from destruction by any of the partners. In several cases Lord Eldon intimated that the court would restrain breaches of particular articles in covenants, *Goodman v. Whitcomb*,⁽ⁿ⁾ or prevent exclusion;^(o) and a bill for an account of past partnership transactions has been sustained, notwithstanding it did not pray a dissolution: *Richards v. Davies*,^(p) *Harrison v. Armistage*,^(q) *Knowles v. Haughton*.^(r) It cannot be reasonably contended that one partner is wholly in the power of his co-partners, and that they may, in defiance of their express or tacit agreement, compel him either to suffer the partnership, business to proceed in a manner which will deprive him of all the fruits of it, or to escape from the partnership, and abandon the business, in which he might have invested all that he possessed,
 [*391] and the loss of which might *be his ruin. They cited

(a) 4 Sim. 8.

(b) 15 Ves. 10.

(c) 2 V. & B. 329.

(d) 1 J. & W. 589.

(e) Id. 594.

(f) 2 J. & W. 266.

(g) 1 Russ. 441.

(h) M'Cel. & Y. 569.

(i) 2 Y. & Coll. 15.

(k) 2 Hare, 383.

(l) Id. 647.

(m) 9 Sim. 609.

(n) 1 J. & W. 593.

(o) 2 J. & W. 269.

(p) 2 Russ. & Myl. 347.

(q) 4 Madd. 143.

(r) 11 Ves. 168. See Collyer on Partnership, 198, n. (d,) ed. 2.

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also *Wallworth v. Holt*,^(a) *Taylor v. Davies*,^(b) *Richardson v. Hastings*,^(c) and *Chapple v. Cadell*.^(d)

March 23d.—VICE-CHANCELLOR :—This is a suit between two partners. The bill alleges a partnership, which will not expire until April, 1847, and it prays that the accounts may be taken, and a receiver appointed; but it does not pray a dissolution. The defendant did not demur to the bill, but answered it; and by his answer he admitted the formation of the partnership for the original term of two years, and declined to give any further answer. The objection to answer is founded upon the 38th Order of August, 1841, which, where the bill is demurrable, enables the defendant to decline answering any interrogatory, or part of an interrogatory, from answering which he might have protected himself by demurrer. The master upon exceptions reported the answer to be insufficient, and the case comes before me upon exceptions to the master's report. I think the master was right.

The argument for the defendant turned wholly upon the proposition, that a bill praying a particular account is demurrable, unless the bill seeks and prays a dissolution of the partnership; in support of which, the case of *Loscombe v. Russell*, and the cases there cited, were relied upon. That there may be cases to which the rule there laid down is applicable, I am not prepared to deny, but the law as laid down in that case was never admitted to be a rule of universal application: *Harrison v. Armitage*, *Richards v. Davies*. And the unequivocal expression *of the opinion of Lord Cottenham in *Taylor* [*392] *v. Davies* and *Wallworth v. Holt*, of the Vice-Chancellor of England in *Miles v. Thomas*, and of Lord Langdale in *Richardson v. Hastings*, shows that there is no such universal rule at the present day; and I cannot but add, that it is essential to justice that no such universal rule should be sustained. If that were the rule of the court,—if a bill in no case would lie to compel a man to observe the covenants of a partnership deed,—it is obvious that a person fraudulently inclined might, of his

(a) 4 Myl. & Cr. 619.

(b) M. R., June, 1834; 4 Law J. Rep., N. S., Chan. 18.

(c) M. R., 15 Jan., 1844.

(d) Jac. 537, n.

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mere will and pleasure, compel his co-partner to submit to the alternative of dissolving a partnership, or ruin him by a continued violation of the partnership contract.

The question before me is, whether, if a general demurrer had been put in to this bill, I should have allowed it. I have no hesitation in saying that I should have overruled such a demurrer.

The title to relief does not depend upon any particular prayer which the bill may contain, but upon the whole of the prayer, including that for general relief, taken in connexion with the allegations in the bill. Upon the allegations of this bill, the defendant, for the fraudulent purpose of compelling the plaintiff to submit to a dissolution upon very injurious terms, is violating the partnership contract, and the object of the bill is to have the benefit of the partnership articles without a dissolution. If the allegations of the bill are true, some accounts must be directed. I do not say whether they would be directed in the form or to the extent which the bill prays; but, if the case made by the plaintiff is true, he is clearly entitled to some relief, and to that relief the right to discovery and to have accounts taken in some form must be incidental. This is not a case for only a partial

discovery; it is a case in which the plaintiff has a right, [*393] upon the allegations of his bill, to call for an answer from the defendant to the charge, that he is endeavoring unjustly to force the plaintiff to submit to a dissolution. It is unnecessary to say, in this stage of the cause, what relief may be given; it is sufficient to say that the court will go as far as it can to protect the rights of the parties; and I have no doubt that it may interpose to support as well as to dissolve a partnership.

I have several times had occasion to say that the 38th order of 1841 applies to a case where the bill is generally demurrable. I know it was meant so to apply. It is said, that the masters entertain doubts whether that is the true construction of the order, and whether they have any right to inquire whether the bill is demurrable, or not, and that they think it is confined to cases where the demurrer would lie only to a particular question; but the order cannot be so limited; in such cases the defendant

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might by answer have declined answering before the order of 1841 was made. The order was intended to meet those oppressive cases where the defendant, being practically obliged to give some discovery, was, by the effect of the technical rule, prevented from refusing discovery to any part of the bill, although part of such discovery might be injurious to him and (where the bill was demurrable) useless to the plaintiff. At the same time, it is not true that the operation of the order is to overrule the law as to demurrers. The defendant, having once answered, has so far committed himself that the case must go to a hearing. But, undoubtedly, the order was not meant to effect what is sometimes attempted,—to enable the defendant merely to put in a short answer, and refuse all further discovery. If the court should find such an use of the order to lead to inconvenience, it may be a question whether the order ought to stand.

 *VISCOUNT DOWNE v. MORRIS.

[*394]

1844:—March 8th, 9th, 11th, 12th, April 3rd, 15th, 22nd.

The lord of a manor taking by escheat, on the death of a tenant without heirs, the fee-simple of lands holden of the manor, but subject to a demise by way of mortgage for a term of years created by the tenant, is entitled in equity, as against the mortgagee, to redeem the term.

If the lord, taking lands by escheat, on the failure of heirs of his tenant, is liable, under the stat. 3 & 4 Will. 4, c. 104, out of such lands to pay a mortgage debt of the tenant charged thereon, he is entitled to redeem the lands, and get in the securities which the creditor held for the debt.

Where a person dies seised of land which he has not by will charged with his debts, the statute 3 & 4 Will. 4, c. 104, makes the lands themselves, and not merely the estate or interest of such person in the lands, assets for the payment of his debts.

Distinction between an equity of redemption and a mere trust.

THOMAS STOBERT, being seised in his demesne as of fee of three closes of land, containing about twenty-four acres, situated in a place called Low-wood, in the township of Glazedale, and parish of Danby, in the county of York, demised the said closes to John Rigg, his executors, administrators, and assigns, by indenture dated the 13th of May, 1805, for the term of one thou-

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sand years, at a peppercorn rent, by way of mortgage, with a proviso for making void the term on payment by Stobert, his heirs, executors, administrators, or assigns, to Rigg, his executors, administrators, or assigns, of the sum of 400*l.* and interest on the 13th of November then next. On the 13th of May, 1819, the 400*l.* and interest were paid off, and a further sum of 300*l.* was advanced to Stobert by Ann Rigg, and the premises for the residue of the term were assigned to her, her executors, administrators, and assigns, by way of mortgage, subject to a proviso for re-assignment thereof, on payment by Stobert, his heirs, executors, administrators, or assigns, unto Ann Rigg, her executors, administrators, or assigns, of 700*l.* and interest on the 13th of November then next.

Stobert died in March, 1830, having by his will devised the premises to William, the illegitimate son of one Sarah Arrowsmith, his heirs and assigns, subject to the mortgage. W. Arrowsmith, after entering into possession of the premises under the devise, died in November,^(a) 1830, a bachelor, intestate, and without any heir. [*395] *Ann Rigg, the mortgagee, being in possession, by indenture dated the 17th of April, 1839, demised the premises to John Robertson, his executors, administrators, and assigns, for the term of sixty-one years, at the rent of 32*l.* a year; and by indenture dated the 16th of June, 1840, Ann Rigg assigned to James Morris, his executors, administrators, and assigns, the mortgage debt of 700*l.* and interest, and the said premises, subject to such right of redemption as the same were then liable to by virtue of the indenture of the 13th of May, 1805.

The plaintiff claimed to be lord, and seised in his demesne as of fee of the manor of Danby, and the services thereof, and to be entitled to all escheats of lands and hereditaments within and holden of such manor and the lord thereof; and the bill, which was filed against Morris and Robertson, for redemption, alleged that the lands comprised in the mortgage had been and were holden of the said manor, and of the lords thereof, by free and

(a) The bill stated a different date; but the death was either proved or admitted to be in November, 1830.

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common socage, and the tenants and freeholders of such lands had been and were bound to do suit and service at the lords' courts, held at the castle of Danby ; and that, upon the death of Arrowsmith, the plaintiff became entitled by escheat to the said lands, and the reversion and equity of redemption thereof, subject to the term, and the mortgage debt and interest. The bill prayed that an account might be taken of what was due for principal and interest on the mortgage, the plaintiff offering to pay the same ; and it prayed, that, upon such payment, Morris and Robertson might assign the premises to the plaintiff for the residue of the term, and deliver up to him the deeds and evidences of title.

The defendants, by their answer, denied that at the death of Arrowsmith the mortgaged premises were held *of the manor of Danby and the lords thereof, and in- [*396] sisted that they were held in fee-simple, and not of any manor. They also denied, that, upon the death of Arrowsmith without heir, the plaintiff became entitled by escheat to the premises, and the reversion and equity of redemption thereof, subject to the mortgage debt or otherwise. The defendant Morris said, that the principal sum of 700*l.* and an arrear of interest was due to him on the mortgage, and the defendant Robertson claimed the benefit of the lease of the 17th of April, 1839.

Evidence was entered into on the question, whether the premises comprised in the demise were holden of the manor and of the plaintiff as the lord. At the hearing,

Mr. *Russell* and Mr. *James Parker* were heard for the plaintiff ; and Mr. *Romilly* and Mr. *Wood*, for the defendants.

No decided case was adduced which would determine the question—of the right of the lord to redeem the term on the one hand, or the right of the mortgagee to hold the lands by virtue of the demise, irredeemable by the lord on the other. The authorities bearing on the point were, *Burgess v. Wheate*,^(a) *Paw-*

(a) 1 Eden, 177 ; 1 Wm. Black. 121, S. C.

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lett v. Attorney-General,(a) *Thrupton v. Attorney-General*,(b) *Sir George Sands' case*,(c) *Fawcet v. Lowther*,(d) *Williams v. Lord Lonsdale*,(e) *Walker v. Denne*,(f) *Taylor v. Haygarth*,(g) *Gordon v. Gordon*,(h) *Whittingham's case*,(i) *Attorney-General v. Crofts*,(k) *Sir Salathiel Lovell's case*.(l)

On the general right of redemption by tenant for life, remainder-man or reversioner, jointress, tenant by courtesy, elegit, statute merchant, or staple, &c. : Co. Lit. 208, a., n.(1) : doweress : *Banks v. Sutton*,(m) *Swannock v. Lyford*,(n) *Lady Radnor v. Vandebendy*,(o) *Palmes v. Danby*.(p) The right of the lord, taking by escheat, to the deeds which concern the land : 10 Vin. Ab. Escheat, tit. C., pl. 7, p. 145 ; *Lord Buckhurst's case*.(q) And to his remedy for waste : 10 Vin. Ab. Escheat, tit. L., pl. 4, 8, 14, p. 154, 155. The right of the mortgagee to hold as against all persons not making out against him a clear right of redemption : *James v. Biou*.(r) Upon the point, whether, according to the true construction of the stat. 3 & 4 Will. 4, c. 104,(s) the lord, claiming by escheat, did not take the lands as assets, subject to the debts of the last tenant who died seised : *Evans v. Brown* ;(t) and whether, therefore, the lord was not necessarily entitled to redeem, or the absurd consequence would follow, that the mortgagee might keep the term, and, at the same time, insist that the lands which had escheated to the lord should, in the lord's hands, be applied towards payment of the mortgage debt.(u)

(a) Hardr. 465.

(b) 1 Vern. 340.

(c) Sid. 403.

(d) 2 Ves. 300, 304.

(e) 3 Ves. 752.

(f) 2 Ves. jun. 170.

(g) V. C. England, 16th, 17th, and 19th Feb., 1844.

(h) 3 Swans. 470, per Lord Eldon.

(i) 8 Rep. 45.

(k) 4 Bro. P. C. 136, Tom. ed.

(l) 1 Salk. 85 ; see also Lit. § 348 ; Co. Lit. 215, b. ; 2 Scriven on Copyholds, 760 ; 1 Sanders on Uses, 297, ed. 5.

(m) 2 P. Wms. 707.

(n) Amb. 7.

(o) Show, P. C. 69 ; 1 Eq. Ca. Ab. 219, pl. 3, S. C.

(p) Pre. Cha. 137.

(q) 1 Rep. 1.

(r) 3 Swans. 237, per Lord Eldon.

(s) An act to render freehold and copyhold estates assets for the payment of simple contract debts.

(t) 5 Beav. 114.

(u) The question is so fully considered in the judgment, that the reporter has thought it unnecessary to introduce more of the argument than the above summary of the au-

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*The VICE-CHANCELLOR said, that the points made by [398] the defendants might most conveniently be divided into two:—First, that no subpoena lay for the lord, claiming by escheat, to assert a mere equitable title, *because* (it was said) there was no privity between him and the defendants; and, secondly, that the lands comprised in the mortgage were not proved to be parcel of the manor. With respect to the first point, he said, he was not prepared to hold that the lord was not entitled to redeem, but that it would be unnecessary for him to decide that point, if the case of *Evans v. Brown*(a) was well decided.

His honor said, that, if the very estate and interest which the lord had in the land was subject to the defendants' debt, the lord must have a right to discharge that estate by paying the debt; and if, upon that principle, he paid the debt, he must have a right to the securities the creditor held for the debt—a right which, in *Burgess v. Wheate*, Sir Thomas Clarke appeared to have thought would belong to the personal representative of a mortgagor who should die without heir, even as against a mortgagee in fee; and if *Evans v. Brown* were well decided, the statute 3 & 4 Will. 4, c. 104, had in fact created the very privity between the lord and the termor, the want of which was the foundation of this part of the defence in the present case.

Upon the question, whether *Evans v. Brown* was well determined, his honor said, that, if he decidedly differed from Lord Langdale, it would be his duty to pursue the course which his own judgment should dictate; but, if the case were doubtful, the opinion of Lord Langdale ought to have great weight with him,—that he certainly had entertained great [399] doubts upon the case of *Evans v. Brown*, founded principally upon these considerations: where an act of parliament creates a new right, and does not provide a remedy, it is left to courts of justice to apply to the case such remedies as are in use in analogous cases; but there are authorities, that, where an act of parliament creates a new right, and at the same time gives a specific remedy co-extensive with that right, the party to whom

authorities cited at the bar, as supporting the various analogies by which the point in discussion was on all sides surrounded.

(a) 5 Beav. 114.

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the right is given has no remedy but that which the act gives. The question upon his mind had been, whether the latter rule applied in *Evans v. Brown*,—that, if the statute 3 & 4 Will. 4, c. 104, had charged the debts of the tenant emphatically upon his estate or interest in the land, and not upon the lands themselves, the question would have arisen, whether, upon the determination of the estate or interest of the tenant, the rights of the creditors were not determined also; or whether the statute was not a parliamentary alienation of so much of the debtor's estate or interest in the land as was necessary to satisfy his debts, and whether such alienation would not bind the lord, whose interests were clearly subject to the alienation of the tenant,—that the case, however, was, in point of expression, stronger in favor of the creditor than the case he had supposed,—that there was ground for contending that the act made the lands themselves assets, and not merely the estate or interest of the tenant therein, which (unless controlled by the context) would make the land assets, into whosoever hands they should come,—that the question, therefore, was reduced to this, whether the notice taken in the statute of the remedies given against the heir and devisee was sufficient to control the larger effect of the previous words which made the lands assets generally,—that these remedies did not appear to Lord Langdale to be co-extensive with the right given to the *creditors under the previous words,—and the policy of the act required that it should be construed liberally in favor of creditors; and as the tenant might have charged the lands with his debts to the prejudice of the lord, there was no reason why the legislature should not have intended the same thing,—that, in a case so circumstanced, he (the Vice-Chancellor) should not oppose any doubt of his own to the deliberate judgment of Lord Langdale, but should follow *Evans v. Brown* in the present case.

Mr. Romilly said, that Arrowsmith died in November, 1830, before the stat. 3 & 4 Will. 4, c. 104, came into operation; and, therefore, that statute would not apply to the present case.

The VICE-CHANCELLOR said, that this point had not been hitherto suggested. The date of Arrowsmith's death had not

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once been mentioned. Mr. James Parker had argued upon the statute as expounded in *Evans v. Brown*, "that the lord, by escheat, takes the lands, subject to debts, as assets; and that, if the lord could not redeem the term, it would follow that this creditor might claim payment of the mortgage debt (out of the lands in question in the hands of the lord) and also keep the term." In answer to this argument the counsel for the defendants had questioned the decision in *Evans v. Brown*, and had emphatically called upon him to exercise his own judgment upon the construction of the statute, insisting that the case depended upon the wording of the statute. The point now made was not suggested in the argument, but it was admitted, (as he understood,) that the case of *Evans v. Brown*, if well decided, pressed the defendants,—an argument which was beside the question if Arrowsmith died *before the statute. If the [*401] point must be decided independently of the statute 3 & 4 Will. 4, c. 104, he should have little hesitation now in saying what his conclusion would be; but, in order that his reasons might distinctly appear, the cause should be in the paper for judgment at the next sitting of the court.

April 15th.—THE VICE-CHANCELLOR: I understand it to be now admitted by both parties, that, by reason of the date of Arrowsmith's death, the statute 3 & 4 Will. 4, c. 104, does not apply to the present case; and that I must decide this cause without being able, as I certainly desired, to found my judgment upon the authority of a case already decided.

The plaintiff is lord of the manor of Danby. The defendant Morris is in possession of lands lying within the ambit of the manor, as mortgagee of those lands for a term of years created by one Stobert, who at the time of making the mortgage was tenant in fee-simple of the same lands. Stobert, the mortgagor, died in 1829, having by will devised the freehold, subject to the term, to one Arrowsmith. Arrowsmith, having become seised of the lands, died without heirs, (as it now appears, in November, 1830.) The plaintiff says, that the lands comprised in the term are parcel of the freehold of the manor of Danby, and were holden of him by fealty,—that, by the death of Arrowsmith in-

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testate and without heir, the lands escheated to the lord, and he files his bill to redeem the mortgage. The defendant's proposition that a subpoena in no case lies for the lord by escheat in assertion of a mere equitable title, or, in other words, that this court could only have regard to the dry legal rights of the parties,

ties, may be consistent with the decision in *Burgess v. Wheate*, *and (if established) might, perhaps, dispose of the present case; for an equity of redemption is certainly a title in equity which cannot be asserted except by subpoena. But the decision in *Burgess v. Wheate* did not require, and certainly did not involve, any such general proposition. In that case there was no escheat at law. The object of that suit was to have it declared, that, where a *cestui que trust* in fee died without heir, the lands escheated in equity; and the court denied it. In this case there is an escheat at law. The lands have escheated to the lord, subject to a mortgage term of years, created by a late tenant of the fee, and the fee simple at law is now vested in the lord. The question is not whether there can be an escheat in equity, where there is none at law; but whether, in the case of an escheat at law subject to a mortgage term, the relative positions of the lord by escheat and the termor are not the same in equity as were those of the late tenant in fee and the termor. *Burgess v. Wheate* did not decide that no equitable interests would, in any case, follow an escheat at law; it decided only, that, where there was no escheat at law there was none in equity.

That I may not be supposed to have overlooked the defendant's argument upon the point, I observe in passing, that, in considering this case, I have kept steadily in view the proposition, so much pressed upon my attention by the defendant's counsel, that the estate which the lord takes by escheat is not that estate which the tenant had. The lord takes in reversion. He resumes the possession of the land upon the determination of the grant to the tenant. His estate is the old fee, of which he becomes seised in possession upon the extinction of the tenancy.

But, giving the defendant the benefit of his proposition, [*403] as to the tenant's estate, is it true, that, *when the lord, by force of his legal right, thus resumes the lands upon

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the determination of the estate of the tenant of the freehold, no equity whatever, which remained in the tenant, can pass to the lord? If a tenant in fee-simple, being entitled to the benefit of an attendant term of years, dies without heir, and the lands escheat, can the trustee of the term hold the lands as against the lord during the continuance of the term, or, will not a subpoena lie in this court to give the lord the benefit of the term? In *Thruxton's case*(a) the judgment of the Lord Chancellor was clearly expressed in favor of the lord by escheat. In the last edition of Sir E. Sugden's, "Treatise on Vendors and Purchasers,"(b) a clear and decided opinion, in accordance with *Thruxton's case*, is expressed; and I clearly understand Mr. Sanders to be of the same opinion.(c) And when I advert to the decisions of this court with respect to attendant terms, I cannot understand why the lord by escheat should be excluded from the benefit of such an interest.(d) In *Burgess v. Wheate*, I think, neither Sir Thomas Clarke nor the Lord Keeper expressed any disapprobation of *Thruxton's case*; the Lord Chief Justice, of course, approved it. In speaking of attendant terms, Sir Thomas Clarke, after saying, that the right of the lord to distrain was as incident to his reversion, and not as heir, says, "And this answers another observation, that the lord may take the benefit of a term *limited to* the owner and his heirs: but the answer is, he does not take it as heir; but, where he takes the inheritance as escheated, he takes the term as attendant upon and following the fate of the inheritance; according to *Sand's case*, *Pawlett's case*, and Lord Jefferies' determination."(e) *Thruxton's case*, if law, destroys altogether the integrity of the defend- [*404] ants' proposition, that a subpoena will, in no case lie for a lord by escheat, and is an authority in point for the plaintiff. I do not say, that I should myself have originated such a decision as *Thruxton's case*; nor whether a different decision might not have been more in accordance with abstract legal reasoning. It is enough for me to say, that it is a decision of the Lord Chancellor, subsequently recognized by text-writers of the

(a) 1 Vern. 340..

(b) Vol. 3, p. 92, ed. 10.

(c) Sanders on Uses, Vol. 1, p. 297, ed. 5.

(d) See 3 Ven. & Pur. 92, ed. 10.

(e) 1 Eden, 208, 209.

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greatest learning and experience; and that it is far better to uphold such a decision than risk the possible consequences of disturbing titles and the practice of conveyancers by impunging it, only to satisfy a principle of abstract reasoning. The laws of real property, do, in many cases, depend upon arbitrary decisions, which it would be impossible to reconcile with dry legal reasoning. It is not, therefore, as I view it, a question for me at this day, whether an escheat may not carry with it some equitable rights and incidents; but the question is, what equitable rights and incidents it will carry with it. Whether the equity of redemption of a term of years will not pass with the freehold to the lord to whom the freehold has escheated, just as the equity of the attendant term will pass to him.

Now, what is the nature of an equity of redemption in the contemplation of a court of equity? In *Pawlett v. Attorney-General*,^(a) Lord Hale, for the purpose of showing, that, where an estate escheats at law by the death of the mortgagee without heirs, the mortgagor may redeem the mortgage, distinguishes an equity of redemption from a trust. He says, the equity of redemption is not a mere trust, but a "title in equity;"^(b) and again, "A power of redemption is an equitable right inherent in the land, and binds all persons, in the post, or otherwise.

[*405] Because it is an ancient right, which the *party is entitled to in equity. And, although by the escheat the tenure is extinguished, that will be nothing to the purpose;"^(c) and Baron Atkyn was strongly of the same opinion. Lord Nottingham also said, "An equity of redemption charges the land, not a trust."^(d) Lord Hardwicke, in *Casborne v. Scarfe*, describes an equity of redemption as an estate in the land, and observes, that it cannot be considered as a mere right only;^(e) and Lord Eldon, in *Tucker v. Thurston*, adverting to the nature of equitable interests, mentions a trust estate, as contrasted with an equity of redemption; which, he adds, are in many respects most materially different.^(f) It is the *land* which in these cases is said to be bound. I do not understand any of the judges in

(a) Hardr. 465.

(d) 1 Eden, 206.

(b) Id. 467.

(e) 1 Atk. 605.

(c) Hardr. 469.

(f) 17 Ves. 133.

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Burgess v. Wheate to have expressed an opinion adverse to what Lord Hale says, in the case in *Hardres*, as to the nature of an equity of redemption. In that part of Sir Thomas Clarke's judgment^(a) in which he distinguishes *Sands case* from *Pawlett v. Attorney General*, as well as in a subsequent part of the judgment,^(b) he appears to me to approve of Lord Hale's distinction, and to say that Lord Nottingham approved of it also. Lord Mansfield certainly approved of what Lord Hale said in *Pawlett's case*; and the Lord Keeper, although he said he believed that what Lord Hale laid down, and Baron Atkyn approved in *Pawlett's case*, had never been decided, remarked, that he hoped the law so settled, and added, "A mortgage is an assignment on condition; the condition being performed, the conveyance is void *ab initio*. Equity dispenses with the time, and when the money is paid, the conveyance is void in equity and conscience." This is very little like a disapprobation of Lord Hale's doctrine as to the nature of an equity of redemption. *Now, I do not cite *Pawlett's case* as an au- [*406] thority for the proposition, that, in the case of the death without heirs of a mortgagor being tenant in fee-simple of the equity of redemption, the equity of redemption in fee-simple would escheat to the lord; it may be taken for granted that such an interest would not escheat. But I cite the case for the twofold purpose of showing, first, what, according to very high authority, is the nature of an equity of redemption as distinguished from a trust, and that arguments drawn from the Statute of Uses which may apply to a trust, do not necessarily apply to an equity of redemption; and, secondly, for the important purpose of showing, that the strict rules of dry legal reasoning are not absolutely conclusive in all cases of escheat; that there are cases besides that of the trustee of an attendant term, in which strictly legal rights, depending upon the law of escheat, are controlled in equity. *Pawlett's case* is an authority, that, in the case of an escheat of the legal fee by the death of the mortgagee without heirs, equity will qualify the strictly legal rights of the lord; and that the defendant's argument is not well founded, that, in

(a) 1 Eden, 205, 206.

(b) Id. 212.

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the case of an escheat, this court, at the present day, is to inquire into the common law of the case, and nothing more.

But, without relying upon *Pawlett's case*, (which is not essential to my judgment in this case,) is not the equity of redemption of a term of years an estate or interest which will pass to the lord, who acquires the fee-simple by escheat? The purely legal rights of the lord are traced with minuteness in the judgments in *Burgess v. Wheate*, beginning with the period when the tenant could not alien without the license of the lord, down to the period when the tenant acquired what he now enjoys—an absolute right of alienation without licence, together with the right of his widow to dower. But, notwithstanding [*407] *these large powers of alienation, whatever portion of the original grant the tenant retains at the time of his death without heirs, that the lord may claim by escheat. I do not include possibilities, or conditions strictly so called, or rights of action, which could not be granted. But, as a general proposition, whatever estate or benefit the tenant retains, which would have passed to his heirs, if he had any, and which could be the subject of grant, that the lord by escheat may claim. Where the tenant retains any parcel of the specific subject of the original grant, the right of the lord requires no circumlocution to define it: he takes it strictly as an escheat. Where, however, the very subject of the original grant has been aliened, and the tenant, as a consideration for the alienation, has reserved to himself something different from the subject of the original grant, such as a rent, there the books qualify the expressions by which the rights of the lord by escheat are described, and he is said to take *tanquam hæres*, and is sometimes called an assign in law.^(a) These principles were not disputed as regards a legal estate or interest remaining in the tenant at the time of the escheat. Now, an equity of redemption is in all respects an interest of the nature of those which at law would pass to the lord by escheat; it is an estate or interest in the land, reserved or retained by the tenant, vested in him at the time of his death without heir, which would descend to his heir if he had one, and which may be the

(a) Lit. § 348; Co. Lit. 215. b.

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subject of grant. Every analogy, therefore, is in favor of the lord, and his claim should prevail, unless the proposition be true, that no subpoena lies for his benefit, and that this court can have regard only to the dry legal rights of the lord. That this is not true I have already shown, by the case of attendant terms; and the case of *Pawlett v. *Attorney-General*, [*408] the observations of the court upon that case in *Burgess v. Wheate*, and the other cases I have referred to, are, in principle, authorities for the same conclusion. If the lord, taking the freehold by escheat, may claim an attendant term, where is the principle for saying he shall not, in this case, take the freehold in every respect as the tenant held it, quoad his estate in the land? The equity of redemption is an estate in the land, not aliened. The equitable interest in an attendant term will pass to the lord with the legal freehold. Why should not an escheat of the freehold carry with it the mortgagor's estate in the land, and the right to make the term attendant by paying the mortgage money? Why is the legal estate, which, in this case, the lord takes without the aid of this court, not to draw to it this particular equitable interest? If the trustee of an attendant term cannot hold that interest for his own benefit, why should the mortgagee be in a different position? I agree with the Vice-Chancellor of England, in *Taylor v. Haygarth*, that *Burgess v. Wheate* binds this court. But *Burgess v. Wheate* stops far short of the defendants' proposition in the present case, and the passages I have quoted from the judgments in that case, with others which might be cited, show that Sir Thomas Clarke and the Lord Keeper did not mean to decide that a subpoena would in no case lie for a lord by escheat. It is one thing to say, that, where the tenant has aliened his whole estate at law, and thereby ceased to be tenant, there shall be no escheat on his death without heirs; and another to say, that the lord, taking lands by escheat, is bound by an alienation of the tenant for a term of years, further or otherwise than the tenant himself was bound. In such a case the argument of Lord Mansfield, in *Burgess v. Wheate*, may well apply.

It was said, however, that, in the case of an escheat
*by the death of a trustee, all equitable interests would [*409]

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fail; and, therefore, the lord should not be permitted to claim equities. To what extent the former proposition was true at the time *Burgess v. Wheate* was decided, I need not inquire. That it holds for all purposes in the case of an escheat, on the death without heirs of a mortgagee in fee, cannot, of course, be affirmed; (*Pawlett v. Attorney-General*;) and, if it were so, it has been well observed, that “it is not every argument in law or in logic that holds *e converso*.”(a)

It was further said, that the equity of redemption was reserved to the mortgagee, “his heirs, executors, administrators, and assigns;” and that the lord filled none of these characters. My answer is that the lord is entitled to the benefit of an attendant term under a like form of limitation, and that the lord is, as I before observed, for the purposes of taking some benefits by escheat, *tanquam hæres and quasi an assign*,—a form of expression which appears to have been adopted to avoid the harshness of dry technical reasoning, in the cases to which it was first applied.

It was also said, that the lord might put in a new tenant of the freehold, and thereby get the same services he had from his old tenant. To this the retort was obvious and decisive—that the mortgagee may receive his principal and interest and costs, and thereby get all he contracted for. There is certainly nothing in this argument which will apply with more force to one party than to the other.

Upon the whole, deferring entirely to the authority of *Burgess v. Wheate*, I think this case is unaffected by it, and that [*410] this is a case in which I am bound to hold *that an equitable right of this nature, inherent in the land, and retained by the tenant at the time of his death without heirs, which would have descended upon his heirs, and which might be the subject of grant, passes with the land to the lord claiming by escheat, and may be enforced in this court by subpoena. If the authorities I have referred to are not to be applied to a case like this, I think their application must be negatived by a higher authority than mine.

(a) 1 Eden, 204.

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It is not necessary, after the opinion which I have expressed, that I should advert to the analogies relied upon by the plaintiff's counsel, some of which—those, for example, which were derived from the case of joint tenants, and the case of the dowress—are not unimportant. And if we go back to early times, when terms of years were considered as mere contracts, perhaps other arguments might be found in favor of the right of the lord as the owner of the freehold.

On the other question, whether the lands comprised in the mortgage are parcel of the manor; or whether the lands have, in fact, escheated to the lord, which the defendants deny, it appears to me in the state of the evidence in the cause that the proper course will be to direct an issue.

ORDERED, that the parties do proceed to a trial at law at the next Assizes for the county of York, on the following issue, viz. Whether at the death of William Arrow-smith, in &c., the mortgaged hereditaments in the pleadings mentioned were held of the manor of Danby, in &c., or not. And in such issue the plaintiff in the cause is to be plaintiff at law; and the defendants in the cause are to be defendants at law, who are forthwith to name an attorney, &c. The Master to settle the same issue in case the parties differ, &c. Further directions and costs reserved. Liberty to apply.

*WOODALL v. WHITE.

[*411]

1844: February 19.

The pendency of proceedings before the Judge at chambers to settle the pleas to the action is no ground for varying the form of the order for extending the common injunction to stay trial.

THE common injunction was obtained in this case, and extended to stay trial, after the defendant at law had obtained leave to plead several matters, and after the Court of Queen's Bench had directed a reference to the Judge at chambers to settle the pleas.

Mr. *Romilly* and Mr. *Anderson* moved that the order for the injunction might be varied by inserting the direction, that it

1844.—Woodfall v. White.

should be without prejudice to the plaintiff at law proceeding to complete the issue ; but

His Honor refused to vary the common order.

WOODS v. WOODS.

1844 : February 10.

Leave to amend the bill, without prejudice to exceptions to the answer which had been overruled.

THE circumstances in this case resembled those in *Drake v. Drake*.(a)[1] In the prayer of process, on a cross bill, for discovery only, the words "and decree" had been introduced by mistake, and the defendant had protected himself against exceptions for the insufficiency of his answer by insisting that the bill was open to a general demurrer.

Mr. *Miller*, for the plaintiff, moved for leave to amend the bill, without prejudice to the exceptions, by striking out of the prayer the words which made it a prayer for relief: *Delatorre v. Bernales*.(b)

[*412] *Mr. *Shebbeare* opposed the motion.

His Honor gave leave to amend without prejudice to the exceptions, the plaintiff paying the costs relating to the exceptions up to the date of the order, and also the costs of the motion.(c)

(a) 2 Hare, 647.

(b) 4 Madd. 396.

(c) See *Dolder v. Lord Huntingfield*, 10 Ves. 401, as to the converse case of amending the exceptions.

[1] In this case it was held that the defendant might by answer decline to answer, under 38th Order of August, 1841, although the obligation to answer was not applicable to any interrogatory in particular, but was founded on the bill being demurrable.

1844.—Whitaker v. Wright.

WHITAKER v. WRIGHT.

1844: April 30; May 2.

The plaintiff in a creditor's suit called a witness to prove the execution of a bond upon which his debt was founded. The defendant, the executor, cross-examined the witness as to the consideration. On the proving of the debts before the Master, the *defendant* insisted that the bond was *usurious*, and obtained leave to examine the witness again upon interrogatories *to be settled by the Master*. On a motion by the plaintiff,—*Held*, that the plaintiff was entitled to cross-examine the witness.

That the application by the plaintiff for leave to cross-examine the witness was proper.

That the cross-interrogatories to be exhibited by the plaintiff need not be settled by the Master.

An administration suit. The plaintiff claimed to be a bond creditor; and, having obtained a decree, carried in before the Master a charge for the principal and interest due upon the bond.(a) A special order was made, allowing the defendants to examine the witness Roscoe on new matters, who had been previously examined for both the plaintiff and defendants in the cause.(b)

Mr. *Romilly* moved, that the plaintiff might be at liberty to cross-examine the witness.

Mr. *Walker* and Mr. *Elmsley* opposed the motion, or submitted, that, if it was granted, the cross-interrogatories ought to be settled by the Master.

*VICE-CHANCELLOR, after stating the circumstances of [*413] the case and the order which the defendants had obtained for leave to examine the witness to the new points:—

Nothing was said upon this order as to the plaintiff having liberty or not to cross-examine Roscoe. The plaintiff has now applied for leave to cross-examine him before the Master; and that he must be at liberty to do so, either as of course or upon special application, cannot be doubted.

(a) See the report of this case, 2 Hare, 310.

(b) Id. 321, 325.

 1844.—Whitaker v. Wright.

Upon this application, the first question which occurs is, is the right to cross-examine the witness of the other party of course, or is that right subject to the discretion of the court? If the right is of course, then no order ought to be made upon this application, except that the plaintiff pay the costs of the motion. If the right is not of course, then, ought the court to direct the Master to settle the interrogatories?

After examining the cases, I find the general rule of the court to be, that the party who has examined a witness before the hearing cannot examine the same witness before the Master without the leave of the court. To this rule there is one clear exception, namely, where a witness has been examined before the hearing only to prove exhibits: *Courtenay v. Hoskins*.^(a) The reason why the leave of the court is generally required proceeds upon an apprehension that the witness may be tampered with, if re-examined after the party calling him knows where the weakness of evidence lies; and the leave, if granted, is
 [*414] accompanied with such restrictions "as may appear necessary to guard against that danger. And from the case of *Smith v. Graham*,^(b) it may, I apprehend, be correctly stated, that, if a party, disregarding the rule of the court, examines a witness, a second time, without leave, the court will for that reason only suppress the depositions, although the second examination may not relate to the same subject as the first. Where an application for leave is made, the discretion of the court is appealed to, and the application may be refused altogether: *Jones v. Thomas*,^(c) *Maton v. Hayter*.^(d) And where the court grants the application, it ordinarily restrains the parties from examining the witness as to the same matter to which he was before examined, and requires that the Master shall settle the interrogatories, to prevent the witness from being led to give evidence upon the same matter as before: this I did in the present cause. In *Rowley v. Adams*,^(e) the Master of the Rolls allowed a witness to be examined a second time as to the same matter, and directed, that he should be examined viva voce before the Master, saying it was discretionary with the court. In *Earl v. Pickin*,^(f) a wit-

(a) 2 Russ. 253.

(b) 2 Swanst. 264.

(c) 3 You. & Coll. 455.

(d) Id. 457.

(e) 1 Myl. & K. 543.

(f) 1 Russ. & Myl. 551.

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ness was allowed to be examined a second time to the same point. In *Birch v. Walker*,^(a) the Lord Chancellor of Ireland held, that, where a witness had been examined in chief in a cause, only to prove a deed, it was not necessary that the Master should settle the interrogatories. Upon applying these decisions to the case now before me, I think the plaintiff should have leave to cross-examine the witness, and that the interrogatories need not be settled by the Master.

*It is plain that the plaintiff must have the right of [*415] cross-examination, for in this case he has had no previous opportunity of cross-examining the witness on the point of usury, no such point being made by the pleadings; I think also that the plaintiff is right in applying for an order. Roscoe is a witness whom the plaintiff has examined in chief, and whom he now proposes to examine a second time, not for the purpose only of proving exhibits; and the plaintiff ought not to be subjected to the risk of having the depositions suppressed hereafter, as in *Smith v. Graham*. The interrogatories need not be settled by the master, because no issue was joined in the cause upon the factum of the bond, the only point upon which the plaintiff has examined him; and the reason upon which the common rule is founded has, therefore, no application. If issue had been joined upon the factum, Lord Redesdale's observations in *Birch v. Walker* might not apply, and in that case the interrogatories might be properly submitted to the judgment of the master.

It was argued for the defendants as a reason for directing the interrogatories to be settled by the master, that, as the plaintiff would know what the defendants' interrogatories were, equality required that the defendants should know the plaintiff's interrogatories, particularly as the defendants would not, as at law, have an opportunity of re-examining the witness. I do not agree in that argument. I do not think that these interrogatories ought to be settled only in order that the defendants may know what questions the plaintiff will ask the witness in cross-examination. The dangers which the court seeks to guard against by strictly

(a) 2 Sch. & Lef. 518.

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restraining the examination of a witness a second time would be thereby let in ; because the defendants would then [*416] have *an opportunity of suggesting to the witness the answers which he is to make. On a cross-examination there is not the same danger, for the party is not in that case asking questions of his own witness. It was contended that the witness is *prima facie* the witness of the party who calls him in chief. Here the plaintiff called Roscoe for the purpose of proving the bond ; but the defendants called him to prove the fact of usury : he is, therefore, substantially the defendants' witness, and there is no necessity for restricting the questions which the plaintiff is to put to the witness.

WHITWORTH v. GAUGAIN.

1844: March, 25th, 26th, 27th, and 28th ; April, 3rd.

An equitable mortgagee of lands is entitled in equity to enforce his charge in priority to a creditor of the mortgagor, who, without notice of the equitable mortgage, has, subsequently thereto, recovered judgment against the mortgagor and obtained actual possession of the lands by writ of *elegit* and attornment of the tenants.

THE plaintiffs were bankers at Northampton, and George Cooke, a solicitor of that town, was largely indebted to them upon his banking account. On the 22nd of April, 1839, Cooke obtained from the plaintiffs a further advance of 3071*l.* 12*s.*, and gave them his promissory note for the payment of that amount, and interest ; he also, at the same time, deposited with the plaintiffs the title-deeds of two closes of land, situated in the manor of Kingsthorpe, and the title-deeds of certain messuages and land in the parish of St. Sepulchre ; and signed and delivered to the plaintiffs the following memorandum :—

“ Be it remembered, that, on the 22nd of April, 1839, the title-deeds relating to four messuages, hereditaments, and premises, situate in the Mounts, in the town of Northampton, late the property of John Wight ; and also of two parcels of land, situate Kingsthorpe, late the property of John Clarke, Thomas at

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Richardson, and Elizabeth *Johnson, were delivered by [*417] me, George Cooke, of Northampton, to Messrs. Charles Whitworth & Son, bankers, of Northampton, in pledge, to secure to the said Messrs. Charles Whitworth & Son, and the survivor of them, or to any future partner or partners interested in that banking establishment, his or their executors, administrators, and assigns, the repayment of the sum of 3071*l.* 12*s.* this day lent and advanced by the said Messrs. Charles Whitworth & Son to me the said George Cooke, and interest after the rate of 5*l.* per cent. per annum; as also all and every sum and sums of money which they the said bankers or co-partners, or any such other person or persons, have already or shall hereafter at any time lay out, pay, or advance to me the said George Cooke, or become in anywise liable for or on my account, either as respects any bill or bills of exchange, drafts, notes, or other security or engagements whatsoever, and interest for the same sum and sums of money so lent and advanced, and to be lent and advanced after the rate of 5*l.* for every 100*l.*, by the year. And I, the said George Cooke, do hereby engage, if required, to execute any legal mortgage or other security of the said premises and land to the said Charles Whitworth & Son, free of all expense.

(Signed)

"GEORGE COOKE."

On the 16th of November, 1840, two actions of assumpsit were commenced against Cooke, one by Edward Lewis Mayor, and the other by the defendant George Pell; and, no defence being made, interlocutory judgment was signed in each action. On the 28th of November Cooke signed two several cognovits,—one for 8*l.* 15*s.* 10*d.* costs, and 957*l.* 16*s.* 4*d.* debt, in the action brought by Mayor—and the other for 8*l.* 15*s.* 10*d.* costs, and 414*l.* 15*s.* 7*d.* debt, in the action by Pell; and the respective sums were thereby made payable on the 1st *of [*418] December, 1840: the sums not being paid, judgments for Mayor and Pell were signed in the several actions on the 2nd of December. Upon these judgments two writs of *elegit* were sued out by Mayor and Pell respectively, one of which was tested on the 19th of December, and the other on the 21st of December. Warrants to execute the two writs were delivered

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to the officers of the sheriff of Northamptonshire on the 28th of December, and, in pursuance thereof, inquisitions were had of the goods, chattels, lands, and tenements of Cooke. On the 30th of December the sheriff's officer delivered to Mayor legal seisin of the closes of land in Kingsthorpe, and delivered to Pell legal seisin of the messuages and land in St. Sepulchre; and the tenants of the several premises thereupon attorned to Mayor and Pell respectively.

On the 3rd of February, 1841, separate fiats in bankruptcy, of that date, were issued against Cooke and Mayor, under which they were declared bankrupts. The defendant Philip Augustus Gaugain was appointed the assignee of the estate and effects of Cooke; and the defendant Joseph Mayor, assignee of the estate and effects of Mayor.

The bill, which was filed on the 17th of March, 1841, charged that the hereditaments and premises comprised in the said title-deeds (together with a policy of insurance which the plaintiffs also held as a further security) were wholly inadequate to satisfy the sums due to them by virtue of such equitable lien. The bill prayed, that an account might be taken of what was due to the plaintiffs in respect of their equitable lien upon the said deeds and writings, and that they might be declared to have an equitable mortgage upon the hereditaments and premises, and to be entitled to priority over the said elegits [*419] and judgments of Mayor and Pell; that the hereditaments and premises included in the plaintiffs' said equitable mortgage (and the said policy) might be sold; and out of the proceeds of such sales, the said debt and costs of the plaintiffs might be paid; and, if the same should be insufficient, that the plaintiffs might be admitted to prove for the deficiency against the estate of Cooke, in the bankruptcy. The bill also prayed the appointment of a receiver, and for an injunction.

The defendant Pell, by his answer, denied notice of the plaintiffs' alleged equitable lien, at the time that the legal seisin of the premises was delivered to him under the elegit; and he insisted, that he was entitled, as a purchaser for valuable consideration, without notice, to the full benefit at law of the elegit. The defendant Joseph Mayor claimed the benefit of like circum-

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stances as to the other property, on behalf of the estate of Mayor the bankrupt.

The result of two motions for a receiver—one founded upon the original, and the other upon the amended bill, before the Vice-Chancellor of England and the Lord Chancellor—has been reported.^(a) The cause being now at the hearing,

Mr. Romilly and Mr. Whitworth, for the plaintiffs, submitted, that they, having, by the advances made upon the security of the deposit of the deeds, acquired an equitable interest in the land comprised therein, were entitled to the aid of the court in protecting their equitable right. The interference of the court for this purpose was illustrated by a long series of authorities, in *which equity had given effect to trusts, [*420] in all their forms, not only against the trustee, but against all persons claiming through or from him. A judgment creditor might, by the common law or under recent statutes, take in execution all which belonged beneficially to his debtor; but he could not take that of which his debtor was merely the legal owner, and whereof the beneficial interest belonged to others. The fact that the defendants had acquired possession by virtue of the *elegit* was immaterial to the question in equity. It was not the case of conflicting parties, both of whom had paid their money, ignorantly, on the security of the same estate; it was the simple case of a general creditor, who, after relying on the personal security of his debtor, came to enforce his demand against the property of that debtor, and whose remedy, therefore, could not extend beyond that which was actually the property of the debtor at the time when the right of the creditor was made to attach upon it: *Burgh v. Francis*,^(b) *Taylor v. Wheeler*,^(c) *Oxwith v. Plummer*,^(d) *Finch v. Earl of Winchelsea*,^(e) *Brace v. Duchess of Marlborough*,^(f) *Sir Simeon Stewart's case*,^(g) *Shannon v. Bradstreet*,^(h) *Maundrell v.*

(a) See *Whitworth v. Gaugain*, Cr. & Ph. 330, 337, 338.

(b) 1 Eq. Ca. Ab. 320, pl. 1; S. C., 3 Swanst. 536.

(c) 2 Vern. 564.

(d) Gilb. Rep. Eq. 13.

(e) 1 P. Wms. 277.

(f) 2 P. Wms. 491.

(g) 3 Ves. 576; S. C., 2 Sch. & Lef. 381.

(h) 1 Sch. & Lef. 52.

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Maundrell, (a) *Sharpe v. Roahde*, (b) *Prior v. Penpraze*, (c) *Casberd v. Attorney-General*, (d) *The King v. Humphrey*, (e) *Doe dem. Wigan v. Jones*, (f) *Lodge v. Lyseley*, (g) *Giles v. Grover*, (h) *Skeeles v. Shearley*, (i) *Newlands v. Paynter*, (j) **Langton v. Horton*, (k) *Cook v. Black*, (l) *Blunden v. Desart*, (m) *Harris v. Booker*. (n) On the form of the decree sought: *Meller v. Woods*. (o)

Mr. *Anderdon*, for Gaugain, the assignee of Cooke.

Mr. *Walker* and Mr. *Hall*, for Joseph Mayor, the assignee of Mayor the bankrupt, argued, that the effect of the statute 1 & 2 Vict. 110, s. 13, being to give the judgment-creditor a specific lien or charge upon the land in equity, the execution of the writ of *elegit*, founded upon the judgment, operated as, and was in effect, a conveyance of the land to the judgment-creditor in pursuance of the charge. The defendants had thereby acquired the legal estate; and the equities of the parties were equal. The clause in the subsequent statute, (2 & 3 Vict. c. 11, s. 5,) providing that such judgments should not affect purchasers or mortgagees without notice, did not in this case affect the validity of the title of the tenant by *elegit*, as against the equitable mortgagee; for the saving of the rights of mortgagees "without notice" necessarily applied to a case in which notice would have been possible, but here the mortgagees acquired their equitable interest long before the judgments were entered up, and, therefore, before they could possibly be known. The provisions which restrain the operation of the judgment in affecting real estate, until the judgment is registered, (1 & 2 Vict. c. 110, s. 19; 3 & 4 Vict. c. 82,) were equally inapplicable; for this creditor had not rested on his judgment alone, but, by proceeding to execution,

(a) 10 Ves. 246.

(b) 2 Rose, 192.

(c) 4 Price, 99.

(d) Daniel, 238; S. C., 6 Price, 411.

(e) M'Cl. & You. 173.

(f) 10 B. & C. 459.

(g) 4 Sim. 70.

(h) 9 Bing. 128.

(i) 3 My. & Cr. 112.

(j) 4 My. & Cr. 408.

(k) 1 Haro, 549.

(l) Id. 390.

(m) 2 Dr. & War. 405.

(n) 4 Bing. 99.

(o) 1 Keen, 16.

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had ripened the equitable interest which a registered judgment would have conferred into a legal possessory *title. [*422] The situation of an equitable mortgagee by deposit of deeds is very different from that of a vendee under a contract for sale. In the latter case, the vendor has in equity altogether parted with the lands; in the former, he retains the lands. In one case, there is an estate both at law and in equity on which the judgment may attach; in the other, there is no estate in equity remaining in the vendor which the judgment can reach. They cited *Plumb v. Fluitt*,^(a) *Metcalf v. Archbishop of York*,^(b) *Rolleston v. Morton*,^(c) *Girling v. Lowther*.^(d)

Mr. Russell and Mr. Terrell, for the defendant Pell.

The right of the plaintiffs must be tried by the language of the memorandum; under which they not only claim to hold the deeds, but insist, as an ulterior consequence, that the defendants must yield up to them the possession of the land. How does that consequence follow? Cooke contracted to execute to the plaintiffs a legal mortgage; they did not call for that mortgage; they went on from day to day dealing with Cooke, and varying the amount of their debt. In the meantime the defendants become substantially purchasers; they, having no notice of the plaintiffs' contract for a mortgage, allow Cooke to become their debtor; they bring actions for their debts and obtain judgment. On what pretence; in this state of things, can the plaintiffs claim a better equity than the defendants? Without any communication with each other,—without notice of the dealings of each other,—the plaintiffs and defendants have both acquired an equitable interest in the lands of *Cooke. What fol- [*423] lows? The defendants, by due course of law, convert their equitable charge into a legal title. They do this adversely to the plaintiffs, by the exercise of the power which the law gives them. Equity only interposes, as between trustee and cestui que trust, under circumstances in which that relation is

(a) 2 Anstr. 432.

(b) 1 My. & Cr. 547.

(c) 1 Dr. & War. 171.

(d) 22 Vin. Ab. p. 22, (F.) pl. 1.

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expressly constituted or is implied from circumstances. In this case there is neither contract nor conduct upon which that relation can be founded or imputed. The parties are rival creditors competing for the satisfaction of the debts out of the property of their debtor. The hostile execution of a writ by one party may give him that lawful advantage which is the result of his prudence and vigilance ; but it cannot, upon any legal reasoning, be said to make him a trustee for the rival claimant, who has been content to rely upon an inferior security, which gives him but a feeble and posterior remedy. They cited *Neate v. Duke of Marlborough*,^(a) *Rogers v. Pitcher*,^(b) *Henry v. Smith*,^(c) *Averall v. Wade*,^(d) *Appleby v. Smith*,^(e) *Ex parte Alexander*,^(f) *Forth v. Duke of Norfolk*,^(g) and Cary's Reports, p. 11.

The counsel for the tenants by elegit all dwelt, moreover, on the language of Lord Cottenham, in his judgment upon the rehearing of the first motion for a receiver in this cause.^(h) The following text-books and digests were also referred to in the course of the argument: Gilbert on Uses, (Ed. by Sugden,) pp. 14, 15, 16 ; For. Rom. pp. 228, 230 ; 2 Fonbl. Eq. p. 257, ed. 5 ; 2 Sug. Vend & Pur. p. 382, ed. 10 ; Coote, Mortgage, pp. 67, et seq. ; 3 Bac. Abr. p. 402, Tit. "Execution."

[*424] *VICE-CHANCELLOR :—The plaintiffs, in this case, are equitable mortgagees of one George Cooke, by a deposit of title-deeds of freehold estates, accompanied with a memorandum in writing, explaining that the purpose of the deposit was to secure a then existing debt and future advances. That memorandum is in the following words. [His Honor stated the memorandum.⁽ⁱ⁾]

To explain the legal effect of this transaction as between the plaintiffs the mortgagees, and Cooke the mortgagor, I shall content myself with quoting the words of the Lord Chancellor of

(a) 3 Myl. & Cr. 407.

(b) 6 Taunt. 202.

(c) 2 Dr. & War. 381.

(d) Ll. & Go. temp. Sugden, 252.

(e) 3 Anstr. 865.

(f) 2 Glyn. & Jam. 275.

(g) 4 Madd. 503.

(h) Cr. & Ph. 336, 337.

(i) Ante, p. 416.

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Ireland, in the case of *Rolleston v. Morton* :^(a) "If a man has power to charge certain lands, and agrees to charge them, in equity he has actually charged them ; and a court of equity will execute the charge." No one, I apprehend, could seriously contend that the memorandum in writing above set forth had not the effect of charging the property as between the mortgagees and the mortgagor. It created as perfect an equitable charge as intention and act can possibly create.

The defendants, between whom and the plaintiffs the contest in the cause exists, are judgment-creditors of George Cooke, whose judgments were entered up after the mortgage to the plaintiffs, and who have since, by means of elegits, obtained actual possession of the lands comprised in the mortgage ; and the question between them is, which of the two is in equity to be preferred to the other ? In considering that question I shall here repeat what I have on more than one occasion already said respecting Lord Cottenham's judgment when this cause was before him upon motion, namely, that I am *satisfied [*425] he did not intend, by what he said, finally to decide the point now before me. However strong the leaning of his mind may have been in favor of the judgment-creditor, he not only did not intend to decide it, but intended that it should be reserved. And I, therefore, consider myself not only at liberty, but bound to decide the cause according to my own understanding of the law.

Now, if the question be not decided by that judgment, I have certainly a very strong opinion upon it. The more I consider the case, the more satisfied I feel that I stated the general principle correctly in *Langton v. Horton* when I said that a creditor might, under his judgment, take in execution all that belonged to his debtor, and nothing more. He stands in the place of his debtor. He only takes the property of his debtor, subject to every liability under which the debtor himself held it. First, take the case of an ordinary trust. It could not for a moment be contended that this court would not protect the interest of the cestui que trust against the judgment-creditor of the trustee.

(a) 1 Dr. & War. 195.

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The judgment of Lord Cottenham in *Newlands v. Paynter*(a) is decisive upon that point, and the other cases cited at the bar prove the same thing. Secondly, take the case of a purchaser for value before conveyance. *Lodge v. Lyseley*(b) is an authority, if authority could be wanting, to show that the equitable interest of such a party will be preferred in equity to the claim of the judgment-creditor of the vendor. Again, take the case of an equitable charge to pay debts, or legacies, or any other equitable interest, except that of an equitable mortgagee, and I apprehend the right of the equitable incumbrancer to be preferred to the judgment-creditor of the debtor, in whom [*426] the legal estate in the *property charged might be, will be, as indeed it properly was, admitted. And if such equitable interests are thus protected, upon what principle is the equitable mortgagee to be excluded from the like protection? Unless I misunderstand the report of the case of *Williams v. Cradoek*,(c) the counsel, as well as the court, were of opinion, that an interest by way of equitable mortgage was entitled in this court to the same protection against judgments as other equitable claimants.

In the argument of this case both parties referred to, and drew conclusions from, the proposition, that in a court of equity a purchaser for value, who obtains a conveyance of the legal interest without notice of an equity affecting the specific subject of his purchase, will, in equity, as at law, have a better title to that subject than the mere equitable claimant. The proposition thus admitted, and necessarily admitted, by both parties, is pregnant with consequences which go a great way towards deciding the question now before me. If the tenant by elegit is (as was argued) to be considered as a purchaser for value without notice under a conveyance, all trusts, and all equitable interests of every description, must be subject to the judgments against the trustee. For a purchaser for value, without notice from a fraudulent trustee, having got the legal estate, will unquestionably be preferred in equity to the cestui que trust; and it appears to me to be impossible, except by a merely arbitrary decision, to

(a) 4 Myl. & Cr. 408.

(b) 4 Sim. 70.

(c) 4 Sim. 316.

1844.—Whitworth v. Gaugain.

distinguish the case of an ordinary trust or other equitable interest from the present, in considering merely the effect of a judgment upon it, unless it can be shown that the interest of the equitable mortgagee is, for the present purpose, distinguishable from that of an ordinary *cestui que trust*. [*427] Again it follows, conversely, that, if the equitable interest of an ordinary *cestui que trust*, or any other equitable interest, is not subject to judgments against the trustee, though executed, then those judgments though executed, are not analogous to purchases for value. In other words, the judgment-creditor of a trustee is not a purchaser for value in the contemplation of a court of equity. The proposition, that a judgment-creditor is a purchaser for value, would prove too much for the defendants' purpose. It would affect all equitable interests alike.

But it was said that the interest of an equitable mortgagee was distinguishable from that of an ordinary *cestui que trust*, and other equitable interests, (charges, for example, to pay debts and legacies paramount the title of the debtor,) which it was admitted would be preferred in equity,—that the interest of the equitable mortgagee was imperfect,—that of the *cestui que trust* perfect. In what respect is the interest of the equitable mortgagee imperfect? As between the mortgagor and mortgagee it is absolute and complete. In what respect is it imperfect as between the mortgagee and those who claim under the mortgagee, as his creditors by judgment? The interest of the equitable mortgagee is liable to be defeated by a fraudulent dealing with the legal estate, and in that respect, no doubt, it is imperfect. But that is an infirmity to which all equitable interests are subject; and if other equitable interests are to be protected against judgments obtained against the trustee, or other party in whom the legal estate may be, why is the interest of the equitable mortgagee to be unprotected? The debt was no more contracted upon the view of the land (if that were material, which I think it is not) in the one case than in the other.

*The most plausible way of stating the case in favor [*428] of the judgment-creditor is by supposing his right to be founded in contract, and not to be the result of a proceeding *in invitum*; and this, no doubt, may be the truth of the case, when

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the judgment is voluntarily confessed ; and I paid the greatest attention to the arguments of counsel upon that point. But, admitting that view to be correct, how does it alter the case ? The question remains,—what was the contract ? It was a general contract for a judgment, and the fruits of a judgment ; and the original question, therefore,—what right does a judgment confer ?—remains wholly untouched by the concession. If a party contracts specifically for a given property, pays the purchase-money, and obtains the legal title, without notice up to the time of obtaining the conveyance, as well as of paying his money, that may give him a right to be preferred to an equitable claim which is prior in point of time. But there is no principle upon which a court of justice can be required to imply that a general contract to give a judgment is a contract to give that which does not belong to the debtor. If the trustee were to confess a judgment, am I to imply that it amounts to a specific contract to give the creditor an interest in that which belongs to the *cestui que trust* ? That appears to me to be the true distinction. In one case the party contracts for a specific thing,—in the other he merely takes a judgment, that gives him nothing more than a right to that which belongs to his debtor.

The above propositions, which, separately taken, I believe to be unimpeachable, will be found to meet every argument that was addressed to me in support of the defendants' case, independently of the late statutes.

I am clear that the late statutes make no difference in [*429] the case. So far as the judgment-creditor claims to be *a mortgagee, in writing, under the statute, he is posterior, in point of time, to the plaintiffs. But it was said that the equity of the judgment-creditor was equal to that of the equitable mortgagee, and that he has, by the force of the *elegit* executed, an estate at law in addition to his equitable interest, and therefore is to be preferred. I need not, after what I have already said, proceed to expose the fallacy of this argument : it takes for granted the whole question in dispute. That the tenant by *elegit* has an estate in that which he may lawfully take, (that which belongs to his debtor,) I do not deny ; but to say, that, by force of the *elegit*, he acquires a rightful interest, in this court, in that

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which in equity does not belong to his debtor, is taking the whole matter in contest for granted ; the whole question being, what he may take.

I can only repeat, that it appears to me impossible, except upon the most arbitrary distinction, to say that the interests of an equitable mortgagee are not to be protected, and yet that protection is to be afforded to the interests of an ordinary *cestui que trust* and other equitable interests. I do not go into the reasoning of the cases which have been cited ; all of them, however, appear to me to support the view I have taken. If my judgment cannot be supported upon propositions which are indisputable in themselves,—whether properly applicable to the case, or not,—no explanation I can give of the cases will at all strengthen the foundation of that judgment. I must hold that the plaintiffs have a right to the payment of their debt out of the estate comprised in the deed. If there is any difficulty in the details of the decree, the case may be mentioned again.

*SOWERBY v. CLAYTON.

[*430]

1844: 28th and 29th February.

In a suit for administration, instituted by the administrator, who was also the first tenant for life of the estate under the will, orders were made for the sale of Bank Stock and East India Stock, and for the realization of other funds and securities, and the investment of the proceeds in Consols, but such orders were not prosecuted :—*Held*, in a suit by the next tenant for life, that the estate of the administrator (plaintiff in the first suit) was liable for the loss or damage occasioned to the estate of the original testator, by the neglect or omission to carry into effect the directions of the said orders.[1]

Direction by will to lay out personal estate, consisting of Bank and East India Stock, and monies standing on other funds and securities, in the purchase of land, to be settled to certain uses ;—whether the stock and funds, not being Consols, ought to be sold and invested in Consols during the interval which elapsed before the purchase of lands was found—*quære*?

JOHN SOWERBY, by his will, dated in 1822, devised his real

[1] See *N. A. Fire Insurance Company v. Mowatt*, 2 Sandf. Ch. Rep. 113.

1844.—Sowerby v. Clayton.

estate to trustees, upon trust to settle the same to the use of his eldest son, William, for life, remainder to the use of the first and other sons of the said William successively in tail male, remainder to his second son, Thomas, for life, remainder to the use of the first and other sons of Thomas in tail male, remainder to his third son, George, for life, remainder to the use of the first and other sons of George in tail male, with remainders to his other children therein named, remainder to his own right heirs; and the testator directed his executors and trustees to lay out the residue of his personal estate in the purchase of land, and to settle the same to the like uses to which he had directed his real estate to be settled. The testator died in 1823, leaving four sons and five daughters. The executors and trustees named in the will all disclaimed the trusts and renounced probate, and letters of administration with the will annexed were granted to William Sowerby, the eldest son.

In 1823 William Sowerby, the administrator, filed his bill against the other children of the testator, and the parties beneficially interested in the estate, among whom was the son of one of the daughters of the testator, who was then the first tenant in tail *in esse* under the limitations in the devise, for the administration of the estate and execution of the trusts of the will under the direction of the court. The decree in July, [*431] 1823, directed *the usual accounts to be taken of the real and personal estate, and gave the plaintiff, William Sowerby, liberty to transfer to the Accountant-General, in trust in the cause, 23,000*l.* Bank Stock, 200,000*l.* Consols, 100,000*l.* Reduced 3*l.* per cents., 42,000*l.* New 4*l.* per cents., 10,000*l.* Bank 4*l.* per cents., and 4000*l.* East India Stock. The said stock was accordingly transferred into court in pursuance of the order. The Master made his report in March, 1824, and thereby found, among other things, that the testator's outstanding personal estate consisted of 7200*l.* West India Dock Bonds, 8000*l.* London Dock Bonds, 1000*l.* Commercial Road Bonds, a lease of tithes in Cumberland, and certain other bond and simple contract debts, all of which particulars he set forth in a fourth schedule to his said report. By an order, on further directions, dated the 15th of July, 1824, the Reduced 3*l.* per cent. Annuities, the several sums of

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4*l.* per cent. Stock, and the Bank Stock and East India Stock, standing in court to the credit of the cause, were ordered to be sold, and the proceeds thereof invested in 3*l.* per cent. Consols; and the dividends to accrue on such Consols when so purchased, and also on such sums of stock until the sale thereof, were ordered to be paid to the plaintiff William Sowerby for his life, or until further order; and by the same order the Master was directed to consider of a purchase wherein to invest the residue of the said personal estate; and the plaintiff was ordered to deposit in the Master's Office the securities for the debts due to the estate of the testator still outstanding, and the Master was to consider of the propriety of calling in the same.

By an order dated in November, 1825, it was ordered, that such part of the half-yearly dividends on the bank stock as should be recovered from time to time by the general [*432] order of the court relative to bank stock(*a*) *should be laid out in the purchase of 3*l.* per cent. consols, and that the interest thereon when so purchased should be from time to time paid to the plaintiff, William Sowerby, until further order. By another order, dated the 30th of April, 1827, the plaintiff, William Sowerby, was directed to get in and convert into 3*l.* per cent. consols the outstanding personal estate set forth in the said fourth schedule to the master's report of March, 1824.

The plaintiff, William Sowerby, in compliance with the order of July, 1824, deposited the said securities in the Master's Office, but he did not prosecute that part of the order of July, 1824, whereby the said reduced and 4*l.* per cent. stocks, and the said Bank and East India Stock, were ordered to be sold, and the proceeds invested in consols; and it did not appear that anything had been done with reference to the outstanding personal estate, which, by the order of the 30th of April, 1827, was directed to be got in and invested in like manner. The plaintiff William Sowerby, continued, until his death, to receive the dividends upon the several kinds of stock, and the interest of the outstanding personal estate. Only a small part of the fund had been laid out in the purchase of real estate.

(*a*) See *Paris v Paris*, 10 Ves. 185; *Clayton v. Gresham*, 10 Ves. 288; *Barclay v. Wainwright*, 14 Ves. 66.

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William Sowerby, the plaintiff in the said suit, died without issue, in August, 1838, and Thomas Sowerby thereupon became tenant for life under the will. Thomas Sowerby, in 1839, filed his bill against the executors of William Sowerby, (George, the next tenant for life, and George Sowerby the younger, [*433] then the first tenant in *tail, being also defendants,) alleging, among other things, that, from negligence, or with the view of deriving a larger income from the testator's estate, the said William Sowerby had omitted to realize the several stocks and securities (other than Consols,) and invest the same in consols; that, if several of the said stocks had been sold, realized, and converted, in conformity with the said orders, at or shortly after the time when such orders were respectively made, they would have produced much larger sums of money, and would have purchased a much larger sum of consols than could be now purchased, the price of such stocks having greatly fallen, and the value of such securities having become greatly depreciated since the said orders, and the price of consols having greatly risen in the same interval; that, by not prosecuting the said decretal orders respectively, the said William Sowerby had occasioned a considerable loss to the said testator's estate, and to the plaintiff and the other parties beneficially interested therein; that certain parts of the said outstanding personal estate had become irrecoverable, owing to the said negligence or laches of the said William Sowerby; that the said lease of tithes was a lease for twenty-one years, renewable by custom every seven years, on payment of a fine to be fixed from time to time by agreement between the lessor and the tenant, and that after one renewal William Sowerby had allowed the said lease to expire.

The bill prayed a declaration that the estate of William Sowerby was liable to make compensation for, or otherwise to make good, to the said estate of John Sowerby the loss and damage sustained by reason of the said several breaches of trust, and acts of laches, and conduct of the said William Sowerby; and that an account might be taken of all such loss and damage, and also of the sums of money received by William [*434] Sowerby *from the interest and income of the said

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estate, and improperly retained and applied by him to his own use; and that the defendants, his executors, might be decreed, out of the assets come to their hands, to make good the same.

Mr. *Romilly* and Mr. *Mylne*, for the plaintiff, cited *Howe v. Lord Dartmouth*,^(a) *Pickering v. Pickering*,^(b) *Dimes v. Scott*,^(c) *Caldecott v. Caldecott*,^(d) and *Hockley v. Bantock*,^(e) as to the relative rights of the tenant for life and the remainderman, and the duties of the former as administrator in this case; and they referred to *Rowley v. Adams*,^(f) on the obligation which was cast upon William Sowerby, as the plaintiff in the first cause, to carry into effect the orders which had been made therein.

Mr. *Kenyon Parker* and Mr. *Shee*, for defendants in the same interest.

Mr. *Koe* and Mr. *Paton*, for the defendants the executors of William Sowerby, argued, that the administrator was justified in retaining the property in its actual state of investment during the interval between the death of the testator and the investment in land. The direction to purchase land, and the absence of any direction for an interim investment in stock, distinguished it from the ordinary case. *Wyatt v. Wallis*,^(g) *Caldecott v. Caldecott*.^(h) It was open to any party to the cause to have applied for an investment. The orders were inconsistent with [*435] each other; and that of November, 1825, must be considered to have rescinded the part of the preceding order of July, 1824, which related to the bank stock. Upon no principle could the estate of William Sowerby be liable to refund the alleged excess of interest, and also to be answerable for the sums of Consols which might have been purchased with the principal,

(a) 7 Ves. 137.

(b) 4 Myl. & Cr. 289.

(c) 4 Russ. 195.

(d) 1 Y. & C. C. C. 312, 737.

(e) 1 Russ. 141.

(f) 4 Myl. & C. 534. (g) V. C. of England, Nov. 20th, 1843.

(h) 1 Y. & C. C. C. 312.

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if it had been invested in Consols before such larger interest became payable.

The VICE-CHANCELLOR said, that in deciding the case he should proceed entirely upon the orders which had been made in the administration suit. It was the duty of the plaintiff in that suit to have prosecuted the orders which he had obtained; and it was not the less his duty because the defendants in the cause might have taken steps in the cause to compel him to do so: a contrary doctrine would afford a dangerous facility for fraud and collusion in suits by executors, in which orders might be obtained and allowed to remain inoperative. Without expressing any opinion as to what was originally the right or duty of the administrator and tenant for life with reference to the conversion of the estate, his Honor said he founded his judgment entirely upon the orders of the court as they stood.

THIS court doth declare, that the estate of William Sowerby is liable and ought to make good to the estate of John Sowerby the loss which may have been sustained by the last-mentioned estate by reason of the stocks in the pleadings mentioned not having been sold and converted, and the outstanding personal estate got in, pursuant to the orders of the 15th day of July, 1824, and the 30th day of April, 1827, made in the cause of *Sowerby v. Sowerby*, in &c. And this court doth order and decree, that it be referred to the Master &c. to whom the cause of *Sowerby v. Sowerby* stands referred, to inquire and state to the court what was the price or value, both in money and in 3l. per cent. Consolidated Bank Annuities, of the several amounts of the stocks and funds by the said decretal order dated the 15th day of July, 1824, made in &c., directed to be sold, on the said 15th day of July, 1824, and also on the 1st day of August, 1838, the day of the death of the said William Sowerby, respectively; and what is the present price or value, both in money and in 3l. per Cent. Consolidated Bank Annuities, of the same amounts of the said several stocks and funds respectively. And the said Master is to inquire, &c., what was the price or value in money of the several securities and particulars of property in the fourth schedule to the Master's report of the 13th day of March, 1824, and also in the Master's report of the 27th day of March, 1827, made in the said cause of *Sowerby v. Sowerby*, mentioned, (other than and except the several debts due from &c., and the lease of the tithes bearing date &c.,) on the 30th day of April, 1827, and also on the said 9th day of August, 1838, respectively, and what is the present price or value, in money and in 3l. per cent. Consolidated Bank Annuities, of the said several securities, and other particulars of property, with such exceptions as aforesaid, respectively. And the said Master is to inquire &c., what was the market price of 3l. per cent. Consolidated Bank Annuities at each of the aforesaid several times respectively. And the said Master is to inquire and state to the court, what amount of 3l. per cent. Consoli-

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dated Bank Annuities the proceeds of the said several funds and stocks in and by the said decretal order of the 15th day of July, 1824, mentioned and directed to be sold, would have purchased, in case the said William Sowerby had duly prosecuted that part of the said decretal order whereby it was directed that the said stocks and funds should be severally sold as therein mentioned, and that the money to arise by such several sales should be laid out in the purchase of 3l. per cent. Consolidated Bank Annuities; and also what amount of 3l. per cent. Consolidated Bank Annuities the proceeds of the said several securities and other particulars of property mentioned in the said reports (with such exceptions as aforesaid) would have purchased, in case the said William Sowerby had duly prosecuted the order bearing date the 30th day of April, 1827, whereby it was, among other things, ordered, that the said William Sowerby do call in the outstanding personal estate of John Sowerby, mentioned &c., except &c.; and whereby it was ordered, that the said William Sowerby should be at liberty to take such proceedings at law or in equity as might be necessary to enforce the payment thereof, or of any part thereof. And in making the said several inquiries the said Master is to fix or specify the particular time or times at which, in his opinion, having regard to the value and amount of the several stocks, funds, and securities, and other particulars of property respectively directed to be converted into money and invested, *the said conversions and investments ought to have been made and [*437] completed respectively, in case the said several orders had been prosecuted with reasonable and proper diligence, with the grounds and reasons for such opinion. [Inquiry as to a particular bond debt.] And the said Master is also to inquire &c, what was the nature and particulars of the lease of tithes in &c., and what was or would have been the fair value thereof in case the same had been sold and realized at the date of the said order of the 30th day of April, 1827, and what was the average annual value thereof, and whether the said lease is still subsisting, and, if not, when and why, and under what circumstances, the same has determined, and whether the estate of the said testator, John Sowerby, has sustained any and what amount of loss by reason of the said lease not having been renewed, and what was the amount of the annual or other income or profits which the said William Sowerby derived from the said lease during his life. And it is ordered, that it be referred to the Master to inquire, &c., whether any and what sums have from time to time, and when, since the said order of the 15th day of July, 1824, was made, accrued as bonuses on the 23,000l. Bank stock, in &c. And the said Master is to inquire, &c, what are the respective amounts of 3l. per cent Consolidated Bank Annuities standing in the name of the Accountant-General of this court, in trust in the said cause of *Sowerby v. Sowerby*, which have from time to time been purchased by such last-mentioned sums, and the dates of such purchases respectively. And in making the said inquiries the said Master is to be at liberty to adopt and use such parts of the proceedings in the said cause of *Sowerby v. Sowerby*, and also of the evidence which was laid before him under the order made &c., as he shall think fit. And the said plaintiff, Thomas Sowerby, submitting to forego and account for any excess of income which he may have received under and by virtue of the said order of the 18th day of January, 1839, until the said order was rescinded by the aforesaid order of the 4th day of June, 1839, it is ordered, that the said Master do inquire and state to the court, what, if anything, was the amount of such excess. Usual directions.

 1844.—Gaskell v. Holmes.

[*438]

*GASKELL v. HOLMES.

1844: March 27 and 28; April 3.

The testator devised and bequeathed his real and personal estate (subject to certain trusts for the benefit of his wife) to his son absolutely; but if his son should die under the age of twenty-one without issue the testator gave the same to his wife during her widowhood, with remainder (subject to certain legacies) as she should by will appoint; and in default of appointment, or in case she should marry again after the testator's decease, he directed, that, from and after the second marriage or decease of his wife, which should first happen, a moiety of the trust estate, or so much thereof as the appointment should not extend to, should be held in trust for all and every the daughter and daughters *who should be then living* of his sister Mary Miles, and the issue then living of such of them as should be then dead, equally amongst them per stirpes.

The testator's son died under twenty-one, without issue, in the testator's lifetime; and the testator's wife also died in his lifetime:—*Held*, that the time of the testator's death was the period at which the persons entitled to take under the said residuary bequest were to be ascertained; that, notwithstanding a daughter of Mary Miles was dead at the date of the will, the children of such daughter, having survived the testator, were entitled, per stirpes, to a share of the said moiety of the residuary estate; that the children of a daughter of Mary Miles—such daughter being living at the death of the testator's wife, but having died in the lifetime of the testator—were also entitled per stirpes to an equal share of the said moiety of such residuary estate: and that the share of the child of a daughter would not lapse by the death of such child in the lifetime of the testator, but the entire share of the class would be divisible amongst the children belonging to such class who survived the testator.[1]

As to the rule of the court in requiring the accounts of the estate to be taken before deciding on the construction of a will.

JOSEPH JOHNSON, by his will, dated in 1823, bequeathed various legacies, and directed his trustees to permit his wife to use his plate and furniture until her decease or second marriage; and he bequeathed his personal estate to trustees, upon trust to convert into money and invest the same; and he devised and bequeathed unto the same trustees all his real estate and chattels real. And the testator directed that his said trustees should stand seised and possessed of the said real and personal estate, upon trust to pay one moiety of the rents, interest, and yearly

[1] See *Gray v. Garharman*, 2 Hare, 268, and note to that case; *Collin v. Collin*, 1 Barbour's Ch. R. 630.

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income thereof to his wife during her widowhood, and in case she should marry again, then to pay an annuity of 100*l.* to her separate use for her life; and, subject to the above trusts, the testator directed that the said trustees should stand seised and possessed of the said real and personal estate for his son Joseph Johnson, his heirs, executors, &c., absolutely. And the testator directed that the estate and interest of his said son in the said trust property should be vested on his attaining the age of twenty-one, or dying before that time leaving issue; but in case his said son should *die under twenty-one without issue, [*439] then the said trustees should stand possessed of the whole of the said trust estate and property for his said wife, for so long as she should continue his widow, and from and after her decease without marrying again, in trust for such person or person as his said wife should by her will appoint, "subject nevertheless," the will proceeded, "to the payment of the sum of 1000*l.*, which in the case last aforesaid I bequeath unto and amongst the daughters of my sister Mary Miles, or such of them as shall be living at the time of my decease, and the issue then living of such of my said sister's daughters as may then be dead, share and share alike, the issue of any such deceased daughter taking the share only which his, her, or their deceased parent would have taken if living; and also subject to the payment of the sum of 1000*l.*, which in the case last aforesaid I bequeath unto and amongst the children then living of Thomas Phillips, and the issue then living of such of them as may be then dead, share and share alike, (per stirpes,) and also subject to the payment of the sum of 100*l.*, which in the case last aforesaid I bequeath to my nephew Joseph Miles, in case he shall be living at the time of the decease of my said wife; and of the sum of 300*l.*, which in the case last aforesaid I bequeath to my brother-in-law Edward Sutton, in case he shall be then living; but in case my said wife shall marry again after my decease, or for want of or in default of any such gift, devise, bequest, limitation, or appointment by my said wife so dying without marrying again as aforesaid, or being such, in case the same shall not extend to the whole of the trust estate and property or, to the whole estate and interest therein, then I direct that, from and af-

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ter the second marriage or decease of my said wife, which shall first happen, my said trustees shall stand seised and possessed of the said real and personal estate whereof no [*440] such bequest, direction, or appointment *shall be made, subject nevertheless to the before-mentioned legacies, upon trusts following ; namely, as to one undivided moiety or half part or share thereof, in trust for all and every the daughter and daughters who shall be then living of my sister Mary Miles, and the issue then living of such of them as shall be then dead, equally between and amongst them if more than one, and their respective heirs, executors, and administrators, as tenants in common, the issue of any deceased daughter to take the share only which his, her, or their deceased parent would have taken if living ; and as to one undivided fourth part or share thereof, in trust for all and every the children or child who shall be then living of Zechariah Barnes, now deceased, and the issue then living of such of them as shall be then dead, (equally, &c., per stirpes, as in the last preceding gift ;) and as to one undivided eighth part or share thereof, in trust for all and every the children or child then living of Roger Hunter, and the issue then living of such of them as shall be then dead, (equally &c., per stirpes, as before ;) and as to the remaining one undivided eighth part thereof, in trust for all and every the children or child of William Hunter, and the issue then living of such of them as may be then dead, (equally &c., per stirpes, as before.) And the testator empowered his trustees to sell his real estate in case his son should die under twenty-one, and without issue.

The testator's wife, named in the will, died in 1825, in the lifetime of the testator. Joseph Johnson, the son, died in 1835, also in the lifetime of the testator, under twenty-one, and without issue. The testator died in 1839.

Roger Hunter had five children living at the date of the will, all of whom survived the testator's wife. One, [*441] *named Betsy, died in the testator's lifetime, unmarried.

William Hunter had, at the date of the will, five children, all of whom were living at the time of the death of the testator's

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wife. One, named William, died in the testator's lifetime, without issue.

Mary Miles had seven daughters, two of whom, Sarah Smith and Deborah Bennett, died before the date of the will, leaving issue; the other five survived the testator's wife; but one, named Ann Smyth, died in the lifetime of the testator, leaving issue.

Zechariah Barnes had, at the date of the will, five children, all of whom survived the testator's wife; and two of them, named Deborah and Mary, died in the testator's lifetime,—Deborah Barnes without issue, and Mary Vaughan leaving issue. One of the children of Mary Vaughan (named Mary Vaughan) died in the lifetime of the testator, without issue; and eight others of the children of Mary Vaughan survived the testator.

The bill was filed by the children of Roger Hunter and William Hunter, against the trustees and the other claimants under the will, for the administration of the estate, and a declaration of the interests of the parties.

Mr. *Kenyon Parker*, Mr. *Cooper*, Mr. *Walker*, Mr. *Koe*, Mr. *Sidebottom*, Mr. *Bacon*, Mr. *Heathfield*, Mr. *Prendergast*, Mr. *T. Turner*, Mr. *Rolt*, Mr. *Prior*, and Mr. *J. Humphrey* appeared for the several parties.

**Viner v. Francis*,^(a) *Christopherson v. Naylor*,^(b) [*442] *Thornhill v. Thornhill*,^(c) *Williams v. Jones*,^(d) *Butter v. Ommaney*,^(e) *Waugh v. Waugh*,^(f) *Tytherleigh v. Harbin*,^(g) *LeJeune v. Le Jeune*,^(h) *Smith v. Smith*,⁽ⁱ⁾ *Giles v. Giles*,^(k) *Rust v. Baker*,^(l) *Archer v. Jegon*,^(m) *Goodtitle d. Weston v. Burtenshaw*,⁽ⁿ⁾ *Bone v. Cook*,^(o) *Gray v. Garman*,^(p) 1 Jarman on Wills, p. 297, 298, and 2 Jarman on Wills, p. 74, were cited.

(a) 2 Cox, 190.

(d) 1 Russ. 517.

(g) 6 Sim. 329.

(k) Id. 360.

(n) Fearn, Cont. Rem., Appendix, No. 1, p. 570.

(o) 1 M'Clel. 177.

(b) 1 Mer. 320.

(e) 4 Russ. 70.

(h) 2 Keen, 701.

(l) Id. 443.

(p) 2 Hare, 268.

(c) 4 Madd. 377.

(f) 2 My. & K. 41.

(i) 8 Sim. 353.

(m) Id. 446.

1844.—Gaskell v. Holmes.

VICE-CHANCELLOR :—In order to explain my judgment, it is not necessary that I should go into the details respecting the several families amongst whom the residue of the testator's estate became divisible, further than to say—first, that one daughter of Mary Miles was dead at the date of the will, and that the children of that daughter are claimants upon the record ; and, secondly, that a daughter of Mary Miles, who was living at the death of the testator's wife, in 1825, died in the lifetime of the testator, leaving children, who also are claimants upon the record. My decision upon these cases will, I believe, cover all the cases upon which I have to decide.

With respect to the first of these cases, and others in the same predicament, I have not any doubt. The gift is to the [*443] children of deceased daughters of Mary Miles *generally, and there is nothing to confine it to the children of those daughters only who were living at the date of the will of the testator. All the grandchildren of Mary Miles born of her daughters, and now living, must be considered as objects of the testator's bounty.[1]

Upon the second case there is much difficulty. It was argued for the heir-at-law and next of kin of the testator, that there was an intestacy in respect of the share bequeathed to the daughter of Mary Miles, which daughter was living at the death of the testator's wife in 1825, and afterwards died in the lifetime of the testator, leaving children who have survived him. The argument in support of the intestacy, as I understand it, is, that, in the events which happened, the time when the legatees were to be ascertained (denoted in the will by the word "then") was the

[1] In *Gray v. Garman*, 2 Hare, 268, which was a case of a gift by a testator of his real and personal estate to his wife for life, and the residue to be equally divided between her brothers and sisters, and in case any of them should be dead, at the time of her decease, leaving issue, such issue to stand in their parent's place. It was held, 1st, that no brother or sister, who died before the date of the will, was capable of taking under the bequest, and therefore the issue of any brother or sister who was dead before the date of the will, could take by substitution ; 2d, that it was not an original and substantive gift to the issue of those brothers and sisters who were dead at the death of the wife ; 3d, that the brothers and sisters who survived the testator, and died afterwards without issue in the lifetime of the wife, were entitled to shares in the residue.

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death of the testator's wife in 1825; that such legatees then took as *personæ designatæ*; that the daughter of Mary Miles who was living at the wife's death was a person designated, and that her legacy lapsed by her death in the testator's lifetime; that her children (now living) cannot be entitled, because they do not answer the description of a daughter of Mary Miles who was dead at the death of the testator's wife,—for that the gift was to the issue then living of the daughters then dead,—a description that does not comprehend the children of the daughter of Mary, then living. If that be the necessary effect of the will, I am, of course, bound so to treat it, although such a construction will exclude whole classes of persons who, *per stirpes*, were clearly objects of the testator's bounty, and the effect will be to create an intestacy. But such a construction must not be put upon the will, unless, by excluding any other rational interpretation, the words plainly require it. It makes the provisions intended for the different branches of the children of *Mary Miles to depend upon the question, whether the [*444] testator's wife should survive him, or die in his lifetime; for the intestacy contended for could not have occurred except by the testator's wife dying in his lifetime. I cannot impute such an intention to the testator, unless the language of the will is so explicit as to exclude any other; and the question is, whether that construction is imperatively required in a case in which the events contemplated by the testator, and on which the legatees were to take, are, according to the very language of his will, events which could, by no possibility, have happened, unless the testator's wife survived him. A decision, that the testator's death, in the events which have happened, was the time to which the word "then" is to be referred, will neither clash with *Archer v. Jegon*,^(a) nor with *Williams v. Jones*.^(b)

In *Archer v. Jegon*, the will, after giving life estates to the husband and wife, gave the property to the children living at the husband's death. There is no question upon that description. The point made was, that the court must alter the natural meaning of the words, and give the property to the children liv-

(a) 8 Sim. 446.

(b) 1 Russ. 517.

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ing at the death of the survivor of the husband and wife ; but the only reason to be assigned for this was, that the will contemplated the wife surviving the husband, and the Vice-Chancellor held, that there was no inconsistency in the two provisions, and, therefore, no ground to control the plain words of the will ; and I agree with him in that reasoning. In *Williams v. Jones*, the testator, after giving a life estate to his wife, in some Long Annuities, gave the same Stock to Thomas Williams, if he should be living at the death of the testator's wife, and if not, he [*445] gave the same to Thomas Playfair Williams, who was*the son of Thomas Williams. Thomas Williams was living at the death of the testator's widow, but both he and the widow died in the testator's lifetime ; and the court held, that, as Thomas Williams was living at the death of the testator's wife, and the legacy to Thomas Playfair Williams was only in the event of Thomas Williams not being living at that time, Thomas Playfair Williams could not take. This imputed to the testator a very irrational purpose,—as irrational as that which is imputed to the testator in the present case ; but the court thought the words clear in themselves, and that there was nothing in the will which afforded room for any other construction. The cases illustrating the general doctrine are collected in Roper on Legacies.(a) If in this case the word “then” is to be referred to the death of the testator's wife, whether she died in the testator's lifetime or survived him, the case of *Williams v. Jones* might be an authority for the argument on behalf of the heir-at-law and next of kin, contending for an intestacy ; but, until that construction is arrived at, the case of *Williams v. Jones* has no application.

I do not say, that, if in this case the wife had survived the testator, the word “then” would not have referred to the time of her marriage or death ; but, according to the language of the will, the gift is to take effect on either of two events, both of which necessarily suppose the testator to be dead. The first event—the marriage—clearly does so, without drawing in aid the redundant but emphatic words of the testator,—“In case my

(a) See Vol. 1, p. 414, ed. 3.

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said wife shall marry again *after my decease*.” The second event as plainly supposes the testator dead. It is not a gift on the death of the wife simpliciter, whether she died in the lifetime of the testator or not, as in * *Williams v. Jones* ; [*446] but it is a gift on the death of the wife, without having fully exercised the powers of disposition given to her by the testator’s will over his own property. It is not (as it was ingeniously put by Mr. Walker) that I attribute that meaning to the testator’s words only upon the principle that a testator always supposes his legatees will survive him ; but my proposition is, that the events themselves upon which alone the testator gives the legacies necessarily suppose that he and his wife are both dead. They are events which could not happen in his lifetime. I agree, that, if legacies are given in remainder, after an estate for life, in terms which leave it perfectly open whether the determination of the life estate is to take place in the testator’s lifetime or after his death, the course of argument which I am now taking may be excluded ; but that, in my judgment, is not the case here. In this case the testator’s very words suppose that both he and his wife are dead, and the question is, how I am to apply those words to the events which have actually happened. My opinion is, that I must apply them to the state of the families as they existed at the death of the testator, and that the word “ then ” must be referred to the earliest moment at which the trust becomes vested in the trustees, and capable of execution.

An objection to this construction at first occurred to me to be, that it might have the appearance of making it a condition upon which any of the legatees were to take, that the wife should survive the husband. I called the attention of counsel to this during the argument, but they declined, and I think properly, to argue for such a construction. I am clear it is not tenable. The intention of the testator throughout the will is, that these legacies shall take effect independently of the fact whether his wife does or does not survive him, although they *are given in terms which suppose that both himself and [*447] his wife are dead.

By the construction which I adopt, the clear and expressed

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intention of the testator is preserved in favor of the objects indicated by his will ; and no violence is done to any of the words in it. I think, therefore, that the grandchildren of Mary Miles, who are the children of the daughter of Mary Miles that survived the testator's wife, but died in the lifetime of the testator, are entitled to the share which under this bequest their parent would have taken if living.

I have, after argument, thought it right to state my opinion on the construction of this will ; but there is a difficulty to which I would call the attention of the parties. If this case should be made the subject of appeal to the Lord Chancellor,—and I am far from saying it is not a case in which the parties would be justified in that step,—the Lord Chancellor might say, as Lord Cottenham did in *Mitford v. Reynolds*,^(a) that I ought not to have decided the question until the accounts had been taken. In that case the trustees prayed an account, and admitted a large surplus in their hands after paying all charges, and the Vice-Chancellor, being pressed, as I was in the present case, for the convenience of the parties, gave his judgment before the accounts were taken. The parties, being dissatisfied with the construction put upon the will, appealed ; and Lord Cottenham refused to hear the appeal. The case was sent to the master, and it was not heard upon the construction of the will until after the accounts were taken. It is not the course of the court to determine such questions before the persons interested and the subject in question are ascertained, *although certainly it is competent for the court to do it. In *Caldecott v. Caldecott*,^(a) Lord Cottenham himself did it. I shall for the future, unless upon very special grounds, follow the general rule pursued by Lord Cottenham in this respect, as being the proper course of the court, and not decide on the construction of a will before the accounts are taken.

THE heir-at-law of the testator admitting the due execution of the said testator's will, declare that the same ought to be established, and the trusts thereof carried into execution, and order and decree the same accordingly. At the request of the counsel

(a) 1 Phill. 183.

(b) Cr. & Ph. 183. See *Hawkins v. Hawkins*, 1 Hare, 543.

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for all parties, declare, that, in the events which have happened, the time of the said testator's death is the proper period for ascertaining the persons to take his residuary property under the residuary gift in favor of the several classes of persons in his will mentioned; and that, accordingly, the moiety thereof given by him in favor of the daughters of his sister Mary Miles, and the issue of her deceased daughters, is divisible into seven equal parts, and that one of such seven parts belongs to the defendant; [declaration as to the several interests of the four surviving daughters;] and another of such seven parts belongs to the defendants Edward Hall, and Sarah his wife, the only child of Sarah Smith, who was another of the daughters of the said Mary Miles, but died in the lifetime of the said testator; and that another of such seven parts belongs in equal shares to the defendants George Smyth, Joseph Smyth, and Elizabeth Udney, the three children of Ann Smyth, another of the daughters of the said Mary Miles, but who died in the lifetime of the said testator; and that the other of the said seven parts is divisible into four equal parts, and that two of such four parts belong in equal shares to the defendants William Bennett and Henry Bennett, two of the four children of Deborah Bennett, another of the daughters of the said Mary Miles, but who died in the lifetime of the said testator, and another of such four parts to Ann Bennett, another of the children of the said Deborah Bennett; and as to the other of such four parts, declare, that so much thereof as was real estate at the time of the death of Joseph Bennett, the other of the said four children of the said Deborah Bennett, belongs to the defendant Alfred Bennett, the heir-at-law of the said Joseph Bennett, and that so much thereof as was personal estate at the time *of the [*449] death of the said Joseph Bennett belongs to his legal personal representative, the defendant Emma Bennett, as part of his personal estate. And declare also, that the one-fourth part or share of the said testator's residuary property given by him in favor of the children of Zachariah Barnes, and the issue of his deceased children, is divisible into four equal parts, and that two of such last-mentioned four parts belong in equal shares to the defendants Esther Houghton and Margaret Wedgewood, two of the children of the said Zachariah Barnes; and that another of the last-mentioned four parts is divisible into eight equal parts, and that four of such equal parts belong in equal shares to the defendants, [declaration as to the several interests of the eight children of Mary Vaughan, who survived the testator;] and as to the other of the said last-mentioned four parts, declare, [declaration as to so much as was real estate at the death of Ellen, one of the children of Zachariah Barnes, in favor of her real representative, and as to so much as was personal in favor of her legal personal representatives.] And declare also, that the one-eighth part or share of the said testator's residuary property given by him in favor of the children of Robert Hunter, in &c., and the issue of his deceased children, is divisible into four equal parts, and that such last-mentioned four parts belong in equal shares to the plaintiffs, [names of the children of Robert Hunter.] And declare also, that the remaining eighth part or share of the said testator's residuary property given by him in favor of the children of William Hunter, in &c., and the issue of his deceased children, is divisible into four equal parts, and that such four parts belong in equal shares to &c., [names &c.] Accounts of personal estate, debts, &c., real estate. Usual directions.

1844.—Harris v. Harris.

[*450]

*HARRIS v. HARRIS.

1844: 30th April; 1st May.

A plea of no partnership to a bill for a partnership account is defective in substance, if not supported by an answer to allegations in the bill, which, if true, would establish the partnership.

To a bill for a partnership account by the representatives of an alleged partner against the survivor, suggesting a pretence by the defendant that no partnership existed, and charging that the defendant was in possession of documents by which the fact of the partnership alleged by the bill would appear, the defendant pleaded no partnership, and supported his plea by an answer to the alleged facts, but did not answer as to whether he was in possession of documents showing the truth of the bill:—*Held*, that the defendant, for the purpose of the argument of the plea, must be intended to admit that he had in his possession evidence which would prove the partnership; and that the plea must therefore be overruled.

THE bill stated, in June, 1834, Walter Harris, the late husband of the plaintiff, entered into partnership with the defendant Thomas Harris, his father, in the business of a postmaster, &c.; and the bill also stated the alleged terms and conditions, and it stated several circumstances as evidence of the existence of such co-partnership: the bill then stated the death of Walter Harris in 1843, leaving the plaintiff his widow and executrix. The bill charged, among other things, that the defendant had in his possession or power divers documents, by which the truth of the said matters would appear; and after the usual interrogatories to such charges, the bill prayed that the partnership accounts might be taken, and the share of Walter Harris ascertained and paid to the plaintiff; and that the defendant, in the meantime, might be restrained from getting in the partnership assets.

The defendant, in bar to so much of the bill as alleged that the late husband of the plaintiff and the defendant entered into partnership at the said time, and as called upon the defendant to set forth the accounts thereof, and as prayed that the said accounts might be taken, and the share of Walter Harris ascertained and paid, and for the injunction, pleaded, that the said Walter Harris and the defendant never entered into co-partnership together as postmasters, &c., or in any other business whatever; and he prayed the judgment of the court whether he ought to be compelled to make any further answer to so much of the

1844.—Harris v. Harris.

bill ; and not waiving his plea, but insisting thereon for answer to the residue of *the bill, and in support of his [*451] plea, said, &c. The answer to the allegations and charges of the bill then followed ; and, among other things, the defendant admitted that he had in his possession divers documents relating to the said business,(a) but, “ save as aforesaid,” he denied that he had any documents whereby the truth of the said matters would appear ; and he insisted, that, inasmuch as the said documents which were in his possession related exclusively to his own title, and did not in any way tend to make out or support the said alleged claim of the plaintiff in respect of the matters in the bill mentioned, he (the defendant) was not bound, and ought not to be required, to produce the same.

The plea was set down, and came on for argument.

Mr. *Temple* and Mr. *Miller*, for the plea.

Mr. *Kenyon Parker* and Mr. *Winstanley*, for the bill.

The cases referred to were *Denys v. Locock*,(b) *Cork v. Wilcock*,(c) *M'Gregor v. East India Comyany*,(d) *Hardman v. Ellames*,(e) and *Dell v. Hale*.(f)

VICE-CHANCELLOR :—The bill alleges that a partnership in trade existed between Thomas and Walter, that Walter has since died, and the plaintiff is his personal representative ; and that the defendant Thomas has carried on the trade since *the death of Walter. The bill suggests a pre- [*452] tence by the defendant that there was no partnership ; it contains averments and charges of facts as evidence of the partnership, and from which the truth of the matters in the bill, it is alleged, would appear ; and it prays a discovery and account. The defendant met the bill by a plea of no partnership ; that plea, however, covered many facts alleged by the bill, which, if true, would have been evidence of the partnership ;

(a) No schedule or other description of the documents was given.

(b) 3 Myl. & Cr. 205.

(c) 5 Madd. 328.

(d) 2 Sim. 452.

(e) 2 Myl. & K. 732.

(f) 2 Y. & Coll. C. C. 1.

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and it was therefore overruled, but leave was given to amend the plea.

The defendant has now put in a plea and answer: the plea is confined to certain parts of the bill; and the plea does not appear to cover any parts of the bill as to which a discovery can be material to the plaintiff, and is therefore so far properly framed; for the plaintiff, by excepting to the answer, may get all the discovery to which he is entitled. But the question is, whether that is enough,—whether it is sufficient that the plaintiff has the means of obtaining the discovery upon exceptions, and whether he is not entitled to have upon the file, at the time of the argument of the plea, an answer to every material averment in the bill which the plea does not cover. This, according to decided cases, appears to depend upon the point, whether the plea is one which (in technical language) is said to require an answer to support it. The cases in which this is necessary are those which Lord Redesdale calls anomalous pleas, and which Mr. Beames calls incongruous pleas.^(a) The example put by Lord Redesdale is that of a bill brought to impeach a decree on the ground of fraud used in obtaining it, where the decree may be pleaded in bar of the suit with averments, negating the charges of fraud, supported by an answer [*453] fully denying them.^(b) There are other familiar examples; as in the case of a defendant who pleads a deed or conveyance which the plaintiff alleges to have been obtained with notice of his equity, charging facts which would be evidence of such notice; or a defendant pleading the Statute of Limitations, where the plaintiff alleges the existence of facts which would go to prove a subsequent acknowledgment of the debt sufficient to take the case out of the statute: *Foley v. Hill*.^(a) The defendant must support his plea, in the one case, by an answer as to the facts alleged as evidence of the acknowledgment; and, in the other case, by an answer to the allegations tending to show the alleged notice. If the plea be not supported by such an answer at the time of the argument, the

(a) See points on the Law of Discovery, p. 171 et seq., ed. 2.

(b) Tr. Pl. 239, ed. 4; Beames, El. Pl. 6.

(c) 3 Myl. & Cr. 475.

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defendant has not excluded the intendments which will be made against himself under the rule, that, "upon argument of a plea, every fact stated in the bill, and not denied by answer in support of the plea, must be taken to be true."^(a) The plea now before me is a negative plea, but so, in fact, are all those examples of anomalous pleas to which I have referred; and it appears to me that the same reasoning must be applied to the plea in the present case as in the cases I have mentioned. Sir John Leach, indeed, expressly refers to pleas of the one sort as furnishing the rule for the other. The reason for requiring the answer as to the facts alleged in proof of the fraud, or notice, or acknowledgment, in the case suggested, is, that a mere general averment is, in such cases equivocal; it might be only a legal conclusion which the defendant conceives may be drawn from the actual facts, or which he undertakes to draw from those facts. Now, the court does not trust a party to draw for himself a conclusion of law, but the court requires to know the facts upon which it is founded, that it may *consider whether [*454] the premises justify the conclusion; not to try whether the plea is true, (which is the business of the hearing, not of the argument,) but to try whether it substantially meets the case made by the plaintiff. The only doubt which occurred to me was, whether the simple question of partnership or no partnership afforded room for that equivocal or possibly evasive denial against which the rule is intended to guard. Partnership is, however, a mixed question of law and fact. There may be circumstances which would have the legal effect of creating a partnership, whilst one of the partners may desire to repudiate, and may think there are grounds for repudiating, that legal consequence. This point, however, scarcely arises in the present case. The bill charges that the defendant has in his possession books, accounts, and papers, by which the truth of the matters alleged—that is, the formation and continued existence of the partnership until the death of Walter—will appear. The answer states, in effect, that the defendant has books, accounts, and papers of his own, which he submits he is not bound to pro-

(a) Tr. Pl. 256, 271, 298, ed. 4; 2 Sch. & Lef. 727.

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duce ; and, excepting these, he has not any documents by which the truth of the alleged matters would appear :—that it would appear upon the documents he has in his possession, he does not deny, and he therefore, for the purpose of the argument, admits it. The plea, therefore, while it avers that there was no partnership, admits that the truth of the contrary would appear by evidence in possession of the defendant ; and this renders the plea, though it may be good in form, substantially bad. The defendant, in effect, undertakes to draw a conclusion of law ; but the intendment being against the pleader with respect to the facts not denied, the result is, that the defendant must, for the purpose of the argument, be considered as having drawn a conclusion, with regard to the effect of the evidence in his possession, which is adverse to the averment by his plea.

[*455] *Such, as I understand the subject, is the result of the authorities. I do not overrule the plea in this case on the ground that the answer would prove it to be untrue ; for this is not the time, nor are there materials before the court, upon which to enter into the question of the truth of the plea : that is, the question at the hearing. Nor do I overrule the plea because the answer is not technically sufficient : that would be properly determined upon exceptions. The ground on which I proceed is, that the rules of pleading (whether well or ill applied to such a case as this, is not the question)(a) require that the defendant should have supported his plea by an answer to this material allegation ; and that his plea, therefore, fails in substance to meet the case made by the plaintiff.

(a) *Points on the Law of Discovery*, p. 175, pl. 250, ed. 2.

1844.—Say v. Creed.

SAY v. CREED.

1844: May 4 and 7.

Although the bill brought by the executor stated that the debts, funeral and testamentary expenses, and legacies of the testatrix had been paid, and the residue specifically appropriated to answer the trusts of the will, and merely sought the direction of the court as to the class of persons entitled to take under such trusts, the court would not decide the question of construction until the accounts of the estate had been taken, unless it should appear that all the class entitled to take were parties to the suit, and competent to bind themselves,—and those parties should waive the accounts of the estate, and accept the same at a given amount,—and the personal representatives should admit the assets for all purposes,—upon which consent and admissions a decree might be made, finally disposing of the estate, but saving the rights of creditors.

THE testatrix devised and bequeathed her real and personal estate to trustees for her mother for life, remainder to her sister for life, with remainder to her next of kin on the part of her mother only, and not to any of her next of kin on the part of her father. After the death of the mother, and sister, the plaintiff, the sole surviving executor and trustee, being in that character possessed of the trust funds arising from the personal estate and the sale of the real estate, filed his bill against the parties claiming to be next of kin for the execution of the trusts of the will, and the declaration *of the rights and [*456] interests of the parties; alleging that the executors had paid all the debts, and funeral and testamentary expenses, and legacies of the testatrix out of the personal estate, and specifically appropriated and set apart the residue to answer and satisfy the trusts of the will. The claimants were, first, the personal representative of the sister, who, if admissible, was the sole next of kin ex parte materna at the death of the testatrix; secondly, the personal representatives of the maternal uncle of the testatrix, who was her sole next of kin at her death, if the sister was excluded; thirdly, the next of kin ex parte materna at the decease of the sister; and, lastly, the personal representative of the sister, if not entitled as next of kin under the bequest, claimed the residue as undisposed of. At the hearing,

 1844.—Say v. Creed.

Mr. *Rolt*, for the plaintiff, submitted, that, in cases where nothing more was required than the simple decision of the court upon a question of construction, the delay and expense of a reference to the Master to take the accounts as preliminary to such decision were unnecessary; that, in the present case, that preparatory reference was especially unnecessary, as the executor admitted that he had in his hands a residue appropriated to the trusts of the will, after all the debts and legacies had been paid, and he required only the direction of the court, with respect to a particular question, as his guide in the distribution of the fund: *Blathwayt v. Taylor*,^(a) *Caldecott v. Caldecott*.^(b)

VICE-CHANCELLOR:—An inquiry to ascertain the persons who form the class, and in the circumstances of this [*457] case, a direction *to the Master to take the usual accounts, in case he should find that the persons constituting the class are parties to the record, would be of course. But I have been asked now to declare whether this is a case in which I shall require the accounts to be taken before I decide upon the construction of the will. The point is one of general practice, and it has been questioned much oftener before me than I should have expected. It is also a question of much importance, and, as to some extent it is necessarily a question of circumstances, I have hesitated as to the propriety of saying anything upon the subject until the question should come regularly before me. There are, however, a few observations which I believe I may usefully make in this case, guarding myself with the observation, that I make them with reference to this case only.

If the accounts are to be taken at all in this suit, they ought, according to regular practice, to be taken before the court decides upon the construction of the will. *Mitford v. Reynolds*^(c) is only one amongst many decisions by Lord Cottenham to that effect; and *Caldecott v. Caldecott*^(d) is no authority against it. That was a very special case: *Hawkins v. Hawkins*.^(e) The

^(a) 11 Sim. 445.^(b) Cr. & Ph. 183.^(c) Phill. 188.^(d) Cr. & Ph. 183.^(e) 1 Hare, 543, n.

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only question then is, whether this is a case in which the court can dispense with the accounts altogether. •

The bill states that the debts, funeral and testamentary expenses, and legacies of the testatrix were paid out of her personal estate ; that a considerable residue remained, and that the executors specifically appropriated and set apart the same to answer and satisfy the trusts of the will. It then states the payment to the tenant for life of the income from the death of the testatrix, in *November, 1828, until the death of [*458] the tenant for life, in 1843 ; and that, upon her death, the necessity for obtaining the opinion of the court arose. Now the bill, though it states the existence of a residue and the investment of such residue, does not state its amount, or how invested, or give any information upon which the court, after declaring the rights of the parties, could proceed to direct the payment or distribution of the fund according to the declaration of right. Supposing this omission supplied, so that the pleadings enabled the court to require the plaintiffs to pay the admitted residue, there is nothing to bind the defendants to accept it without the account ; and if, in such circumstances, I should make a decree simply declaring the construction of the will, and not directing the accounts, there is nothing to prevent the residuary legatees from instituting another suit to have the accounts taken. If, to obviate this objection, the amount of the fund should be agreed upon between the parties and the defendants should waive the taking of the accounts under the decree, there is nothing in the bill to authorise me to insert in the decree an admission of assets by the plaintiffs as the ground of the decree ; and a decree for payment without such admission, whether the money is in court or not, would discharge the executors from their liability to creditors, without any inquiry into the claim of any creditors there might be.

I will add, that, as at present advised, my opinion is, that, in this suit, and for the purposes of this suit, my decision as to the necessity of taking the accounts must be the same whether the trustees or the cestui que trusts were plaintiffs, the suit being in other respects the same. If the practice of the court makes it

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proper that the accounts should be taken, the trustee filing the bill submits to account.

[*459] *With respect to the alleged appropriation, I do not deny, that, if the fund has been so appropriated as to be taken out of the testator's estate, and made the property of the cestui que trusts, it might be open to the argument contended for. The test is, whether, if a debt came to the knowledge of the executors, or any other demand in respect of the estate arose, they could pay it out of the fund without filing a bill. It is impossible to consider the unsupported allegation in the bill as establishing such an appropriation. So far, therefore, as the decree is to depend upon the pleadings as they now stand, I cannot advise the parties to expect that I shall dispense with the accounts. I could not do so in this particular case without in effect deciding that this court, as a matter of course, entertains suits merely to declare rights or administer trusts piecemeal, or that this court will distribute a residue (thereby discharging executors) without having regard to the interests of creditors. No one acquainted with the practice of the court, or who has observed the consideration which those very questions have received elsewhere, will contend, as a general proposition, that such a decision would be consistent with that practice in ordinary cases.

On the other hand, I have never doubted that a personal decree might be made against an executor upon an admission of assets, guarding that decree (where necessary) with proper reservations: *Gordon v. Scott*.(a) [*460] *That, therefore,

(a) GORDON v. SCOTT.

1844: January, 12th.

Decree in legatees' suit, on admission of assets, without taking the accounts.

THE bill was filed by three persons entitled in remainder, after the decease of the tenants for life, to several legacies, and, among others, a legacy of 16,000*l.*; and it prayed, that the usual accounts of the estate might be taken, and the debts ascertained, and that out of the surplus the amounts of the several legacies might be transferred and secured in court. The defendants, (one of whom was residuary legatee, and also entitled to the life interest in the legacy of 16,000*l.*,) by their answer, said, that they had paid all the debts and funeral and testamentary expenses of the testatrix, and had invested in stock the amounts of the several legacies claimed in the suit, and

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which is now wanting in the pleadings may possibly be supplied by the undertaking and consent of the parties. But this is not the time for requiring or giving such consent or undertaking. The proposed inquiries as to the next of kin may be made; and there may be a contingent direction to take the accounts, if the parties desire such an order;(a) and if, when the cause shall come back upon further directions, it shall appear that the next of kin entitled are parties, and sui juris, and are competent to bind themselves, and those parties waive the account of the estate, and agree to accept a given sum in full satisfaction of their claims under the will of the testatrix, [*461] so that, after declaring their rights, *I may be able to direct payment or distribution of the residue, thereby finally disposing of the estate; and if, in addition to this, the personal representatives of the testatrix will admit assets for all purposes, the case will then be open for the parties to contend, that I may properly, saving the rights of creditors, make a final decree, inserting therein the waiver of the accounts and the admission of assets, to explain the ground upon which it is made. If any of these requisitions are not complied with, I do not en-

had appropriated such sums of stock to answer the same; and they admitted that the residue appropriated to the use of the residuary legatee was more than sufficient to pay the costs of the suit, if the court should decree the same to be paid out of such residuary estate. At the hearing of the cause,

Mr. *Anderdon* and Mr. *Hardy*, for the plaintiffs, insisted, that, notwithstanding the admission of assets, they were entitled to have the accounts taken and the estate cleared; for the legacies were not to be paid to the parties, but would of necessity remain in court, and, being in court, would be open at any time to the claims of creditors, which might have the effect of throwing the debts exclusively upon the interests of the parties entitled in remainder to these sums. (See *Llaskley v. Hogg*, 11 Ves. 602.)

Mr. *Roupell*, for the defendants.

The VICE-CHANCELLOR decreed the several legacies to be carried over to distinct accounts, intituled respectively "The Annuity Accounts of" &c., (naming the respective tenants for life,) the dividends to be paid to the respective tenants for life until further order, with liberty to any of the parties to apply.

(a) See *Fisk v. Norton*, 2 Hare, 382.

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courage the parties to expect they will get from me any decree without the accounts being first taken.

[His honor added, that he had reason to believe there was not any difference of opinion on the subject between the different branches of the court.]

EMPRINGHAM v. SHORT.

1844: February 23rd and 26th; March 18th.

Where a sequestrator obtains possession of property, as belonging to the party against whom the process issued, and such property is claimed by a third person, the mode of trying the right is in the discretion of the court.

A defendant, being in contempt for non-payment of money, executed a conveyance of his real estate to his son, and the son entered into possession under the conveyance. Some months afterwards a sequestration issued against the defendant founded on the same contempt, and the sequestrator took possession of the estate. The defendant's son was examined *pro interesse suo*, and the master found, that, as between the defendant and all persons claiming under him, the son had an absolute estate and interest in the premises under the conveyance, and the possession taken thereunder, subject to the question between the defendant's son and the plaintiffs, or between the court and plaintiffs and the defendant's son, arising out of the contempt and the sequestration: the court directed issues to try whether the conveyance by the defendant to his son was fraudulent, within the stat. 13 Eliz. c. 5, and whether the consideration-moneys were paid before the sequestration issued.

Whether the proper form of objecting to the report of the master, or an examination *pro interesse suo*, is by exceptions—*quære*

THE plaintiff was the surviving trustee under the will of J. Wilson. The widow of Wilson was tenant for life of [*462] certain lands devised by the will, and married *the defendant James Short. In June, 1830, the bill was filed, and in July of the same year an injunction was obtained to restrain the defendant James Short and his son William Wilson Short from committing waste on the devised lands. In May, 1839, a motion was made to commit the defendants for breach of the injunction,(a) and upon that occasion James Short undertook to make reparation for the damage, and it was referred to the master to inquire what reparation the defendant James Short

(a) See 11 Sim. 78, where the proceedings on the motion are stated.

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ought to make, and he was ordered to make the same accordingly, and to pay the costs of the application and inquiry.

In June the master prepared his report, to which the defendant took objections; those objections were disallowed in August, and the report was signed in November, 1839. By the report the master found that the reparation which the defendant James Short ought to make for the damage to the testator's estate was 150*l.*, to be paid by him into court, and the master taxed the costs at 48*l.*, to be paid by the defendant to the plaintiff. On the 25th of November, the plaintiff, upon motion on notice, obtained an order upon the defendant to pay the two sums stated in the master's report. On the 4th of December, 1839, the writ of execution issued; and after an unsuccessful motion to discharge the order for payment, the defendant James Short was, in February, 1841, taken under an attachment for disobeying the order, and on the 29th of April an order of sequestration was made against him, which was issued on the 22nd of May.

On the 28th of May the sequestrator took possession *of the lands, farming stock, furniture, and effects in ques- [*463] tion, which were at that time in the possession, not of the defendant James Short, against whom the process had issued, but of the defendant William Wilson Short, his son. It did not appear that any resistance was made to this step on the part of the sequestrator.

On the 14th of July, 1841, William Wilson Short applied for, and obtained leave to go in and be examined *pro interesse suo*. In December, 1841, the common order giving the plaintiff liberty to examine witnesses was made; and on the 18th of April, 1842, an order was made that William Wilson Short should be at liberty to examine witnesses in support of his claim, and the master was ordered to look into the examination, and certify whether William Wilson Short had any interest in the property in the hands of the sequestrator.

The master, by his report dated the 1st of December, 1843, stated, that he had looked into the examination of William Wilson Short, and into the depositions of the witnesses, and he found that the claim of William Wilson Short was to the whole estate and interest of the defendant James Short, his father, in

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the property in question, under a purchase thereof from his father, and conveyances to him by his father, for a valuable consideration, before the making of the order for, and issuing the sequestration in this cause. The master then proceeded to find the particulars of the previous proceedings, and of the sequestration and the occasion thereof; and he set forth a description of the premises taken possession of under the sequestration. As to the general claim made by William Wilson Short to the sequestered premises, the master found, that, in the month of October, 1839, the defendant James Short made and executed [*464] certain indentures of lease and release, bearing date respectively the 14th and 15th days of the same month, which were sealed and delivered in due form of law; by which indenture of release, it was witnessed, that, in pursuance and performance of the agreement thereinbefore recited, and in consideration of the sum of 290*l.* to James Short paid by William Wilson Short, at or before the execution thereof, the said James Short conveyed to the said William Wilson Short, and his heirs, the premises therein comprised, being the premises comprehended in this suit. And the master further found, that James Short made and executed certain other indentures, dated the 14th and 15th days of the same month of October, which were also sealed and delivered in due form of law; by which indenture of release it is witnessed, that, in consideration of the sum of 70*l.* to James Short paid by William Wilson Short, together with the sum of 200*l.* due upon the mortgage of the premises to one Neyers, the said James Short conveyed to the said William Wilson Short, and his heirs, the premises thereafter described. And the master found, that the various sums mentioned in the said several indentures as the considerations for the same amounted altogether to the sum of 560*l.*, and that no part thereof was, at or before the date of the said indentures, actually paid down in money by William Wilson Short, but that he thereupon gave to James Short his (William Wilson Short's) promissory note for 560*l.*, payable on demand. And, as to the payment of the said promissory note, he found, by the examination of the said William Wilson Short, that the same was paid in manner therein mentioned. And the master, after stating the evidence

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laid before him, found and submitted, that, so far as respected William Wilson Short, and James Short and all persons claiming under him, the said William Wilson Short had, under and by virtue of *the said purchase from the said [*465] defendant, and the deeds and conveyances executed thereupon, an absolute estate and interest in the whole of the said sequestered premises, commencing from the date of his aforesaid deeds and conveyances, and the possession taken thereunder, subject only to such questions as had arisen between William Wilson Short and the plaintiffs, or between this court and the plaintiffs and William Wilson Short, by reason of the sequestration, issued by this court at the instance of the plaintiffs against the said sequestered premises, by reason of the defendant being in contempt for not paying into court the said several sums; which sequestration he found was not issued until the expiration of more than nineteen months after the execution of the said several deeds and conveyances, and the possession of the said property by William Wilson Short; and which question not being referred to him, and involving in its consideration the jurisdiction of the court in matters of contempt, he had not thought himself at liberty to exercise any judgment upon, or to do more than state the circumstances in the manner he had done by that his report, the better to enable the court to decide thereupon.

William Wilson Short obtained and served the order *nisi* for confirming the report; and the plaintiff took exceptions to it, for that the master ought to have found that the several indentures of October, 1839, were devised and contrived of malice, fraud, covin, and collusion, to the end, purpose, and intent to delay, hinder, and defraud the plaintiffs of their just and lawful actions, suits, debts, accounts, and damages; and that he ought to have found that William Wilson Short did not acquire any interest in the sequestered premises under such fraudulent indentures, or, at all events, no interest therein as against the plaintiffs.

*Mr. Romilly and Mr. W. M. James, for the plaintiff. [*466]

Mr. Russell and Mr. Rolt, for William Wilson Short, objected,

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that it was irregular to except to the report of the master made upon an examination *pro interesse suo*; and that the report, not being objected to in a proper form, must be conclusive: *Hamlyn v. Lee*,^(a) *Cooper v. Thornton*,^(b) 1 Dan. Ch. Pr. 646.

[His Honor reserved the objection to be disposed of, with the case generally.]

Mr. *Romilly* and Mr. *W. M. James*, for the plaintiff, then argued that the conveyance and assignment of the property by James Short to his son were made with the view of defeating the sequestration, and were, therefore, void as against the plaintiffs: *Bird v. Littlehales*,^(c) *Coulston v. Gardiner*^(d) The evidence, with respect to the alleged payment of the consideration, was such as to lead to the inevitable conclusion, that the pretended conveyance was not made *bona fide* for valuable consideration, and on that ground it was void, under the stat. 13 Eliz. c. 5. The court would decide the question of the alleged right of the claimant on the evidence now before it; there was no rule requiring the court to give the claimant an opportunity of trying his right in any other proceeding: *Angel v. Smith*,^(e) *Wharam v. Broughton*.^(f) The proceeding under the order for examination *pro interesse suo*, although in one point of view interlocutory, yet is in substance of itself a distinct suit, prosecuted in a peculiar form, but a form *which affords [*467] facilities for doing justice between the parties, equally with suits commenced in the ordinary manner.

Mr. *Russell* and Mr. *Rolt*, for William Wilson Short.—There are three classes of cases in which questions may arise between the sequestrator appointed by this court and third parties. First, where the property in the possession of the sequestrator was not, and has never been, actually or constructively, in the possession of the claimant: in such a case the party claiming the property is not allowed, as against a receiver or sequestrator, to take the law in his own hands, or assert his right without the previous

(a) 1 Dick. 94; S. C., 3 Swans. 301, n.

(b) 1 Dick. 72.

(c) 3 Swans. 299, n.

(d) Id. 279, n.

(e) 9 Ves 335.

(f) 1 Ves. 180.

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leave of this court; and, as a preliminary step in obtaining that leave, he comes in to be examined pro interesse suo. It is to cases of this class alone that the course of proceeding known as examination pro interesse suo strictly applies. The class of cases nearest to these is where the order of this court gives the plaintiff a right as against a specific estate; and, in the execution of that order, the legal right of a third person, as of a mortgagee, is disturbed. In cases of this class, where the claimant had acquired his right pendente lite, he was required to come in and be examined pro interesse suo: *Bird v. Littlehales*, *Witham v. Bland*,^(a) *Lord Pelham v. Duchess of Newcastle*.^(b) It is otherwise where the right was acquired before the institution of the suit. The third case is where the sequestration issues, to enforce payment of a debt, or otherwise to compel obedience to a decree or order, and the sequestrator takes possession of property which does not belong to the party against whom the process is issued, but belongs to, or is in the actual possession of, a third person. This is a simple abuse or excessive exercise of *the powers of his office, and has not the effect of alter- [*468] ing the rights or remedies of the owner of the property thus dealt with. The court does not avail itself of this conduct of the sequestrator to assume a jurisdiction over the property, which it would not have had if the party had not been dispossessed by the sequestrator; and the court will, therefore, restore the claimant to his possession: *Lord Pelham v. Lord Harley*.^(c) The order for payment of money, out of which the sequestration arose, was not made in a suit against the defendant in respect of the land, but was only a personal debt, and the land in such a case was not bound until the sequestration was issued: *Crofts v. Oldfield*,^(d) *Johnson v. Chippindall*,^(e) *Wilson v. Metcalfe*.^(f) Even if the court considered the evidence insufficient to prove the bona fide character of the sale, it would not decide the case against the purchaser upon this proceeding; but, at the utmost, would leave the plaintiffs to enforce any claim they may have against the property, by instituting a specific suit for that pur-

^(a) 3 Swann. 277, n.^(b) Id. 289, n.^(c) 3 Swann. 291, n.^(d) Id. 278, n.^(e) 2 Sim. 55.^(f) 1 Beav. 263.

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pose: *Simmonds v. Lord Kinnaird*.(a) [The circumstances with regard to the alleged sale and payment of the consideration-money, as they appeared on the evidence, were much discussed with reference to the question, as to the bona fide or fraudulent character of the transaction. *Worsley v. Demattos*,(b) *Baxter v. Pritchard*,(c) and *Rose v. Haycock*,(d) were also cited.]

VICE-CHANCELLOR, after stating the dates of the several proceedings in the cause :—

The Master, by his report, has found, that the several [*469] *conveyances of October, 1839, were executed by the defendant James Short, and are binding as between him and William Wilson Short; but the report in terms keeps open the question of the validity of the deeds as between the plaintiffs or the court on the one side, and William Wilson Short on the other. Exceptions were taken to this report, upon which the main question was, as to the conclusion to which the Master had come. It was, on the part of William Wilson Short, objected, that it was irregular to except to a report of this kind. It is, however, quite clear, that, if it be irregular to file exceptions, it can only be that exceptions are unnecessary; and that the court will, at the instance of either party, look into the evidence upon which the Master has proceeded without exceptions being taken. It cannot be seriously argued, that, if in this case the Master had found William Wilson Short not to be entitled, the court would have concluded him by that finding; but it becomes unnecessary to consider the mere point of form, for William Wilson Short has served the order nisi to confirm the report, and wherever the order nisi is regular, there the party has a right to except. Upon that part of the case, therefore, whatever the correct practice might be, I should give no costs to either party. It appears by the register's book, that the report in Dickens of *Hamlyn v. Lee* is not accurate; but I abstain from giving any opinion upon the strict practice in such cases, because I can get at the justice of the case without doing so.(e)

(a) 4 Ves. 735.

(b) 1 Burr. 467.

(c) 1 Ad. & Ell. 456.

(d) Id. 460, n.

(e) See 1 Smith Pract., p. 589, ed. 3.

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The first question was, whether the court would try the rights of the parties upon this proceeding. Cases of this kind are of rare occurrence; and I hesitated much *upon this [*470] part of the case, never having had occasion to consider the practice before. Upon looking into the authorities collected in Mr. Swanston's Reports,^(a) and in Daniell's Chancery Practice,^(b) and on referring to the cases of *Angel v. Smith*,^(c) *Brooks v. Greathed*,^(d) *Johnes v. Claughton*,^(e) *Wharam v. Broughton*,^(f) and *Copeland v. Mape*,^(g) it is perfectly clear that the court exercises a discretion. Where the case has been considered to admit of no doubt, the court has determined it without a reference to the Master. In some cases the court has ordered the parties to bring an ejectment: in other cases, where the sequestrator has found a person in possession of the property, the court has ordered a writ of assistance to issue, unless the party submitted to come in and be examined pro interesse suo. The court sees what is necessary to be done in order to try the question of right, and it then puts it in the way of trial. If the court could not thus assert its jurisdiction, a sequestration would be a mere form. I have not the slightest doubt of the jurisdiction to try the question; my only doubt has been on the manner in which it may best be tried, and on what ought to be done in the meantime.

[His Honor then went into a minute examination of the evidence with respect to the sale, and payment of the consideration; and concluded that the right of William Wilson Short was not satisfactorily established by that evidence, and that the proper mode of trying it would be by an issue.]

*THE court doth order, that the said plaintiffs and the said William Wilson Short proceed to a trial at law in her Majesty's Court of Exchequer of Pleas, at the next assizes for the county of Lincoln, by a special jury, on the three following issues, namely, first, whether the consideration-moneys expressed in the said several indentures, dated respectively the 14th and 15th days of October, 1839, and the 14th and 15th days of October, 1839, in the said Master's report of the 1st day

(a) 3 Swans. 276 et seq.

(b) Vol. 1, p. 646 et seq.

(c) 9 Ves. 335.

(d) 1 Jac. & Walk. 176.

(e) Jac. 573.

(f) 1 Ves. 180.

(g) 2 Ba. & Bea. 66.

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of December, 1843, respectively mentioned, and for which the said indentures purport to have been made, were paid to the defendant James Short, by the said William Wilson Short, before the writ of sequestration, dated the 22d day of January, 1841, was issued in these causes; second, whether the conveyance made by the said indentures of the 14th and 15th days of October, 1839, in the said last-mentioned report firstly mentioned, was made of fraud, covin, or collusion, within the meaning of the act of parliament made and passed in the 13th year of the reign of her late Majesty Queen Elizabeth, intituled "An Act against fraudulent Deeds, Alienations," &c.; third, whether the conveyance made by the indentures of the 14th and 15th days of October, 1839, in the said last-mentioned report secondly mentioned, was made of fraud, covin, or collusion, within the meaning of the said act of parliament made and passed in the 13th year of the reign of her late Majesty Queen Elizabeth, intituled "An Act against fraudulent Deeds, Alienations," &c. And it is ordered, that the said claimant, William Wilson Short, be plaintiff at law in the said issues, (the plaintiff here not opposing the same,) and the plaintiffs here are to be defendants at law, who are forthwith to name an attorney, accept a declaration, appear and plead to issue. And it is ordered, that it be referred to the Master, &c., to settle such issues in case the parties differ about the same; and, if upon the trial of the said issues, any special circumstances should arise, the same are to be indorsed upon the postea. Usual directions.

The cause was tried on feigned issues, at the Lincoln Summer Assizes, 1844, and a verdict was found for the defendants (plaintiffs in equity) on all the issues.

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*EVELYN *v.* LEWIS.(a)

1844: June 8.

In suits by creditors and legatees a receiver was appointed of the rents and profits of real estate, part of which was copyhold. The death of the last tenant having been duly presented at the court-baron of the manor, proclamations were made for the next tenant to come in, and be admitted, and, no person appearing, the bailiff of the manor was ordered to seize the lands quousque. Declaration in ejectment at the suit of the lord was afterwards served on the terre-tenant; but, on the motion of the receiver, the lord was restrained by injunction from prosecuting the action.

A RECEIVER of the rents and profits of the real estate of Lynden Evelyn, deceased, was appointed by an order dated the 23d of August, 1839, made on these (creditors' and legatees')

(a) *Nom. Plunkett v. Lewis*, Reg. Lib.

1844.—*Evelyn v. Lewis*.

causes ;(a) and the tenants were ordered to attorn and pay their rents in arrear, and growing rents to such receiver, who was to be at liberty, with the approbation of the Master, to manage, set, and let the said estates, as there should be occasion. Part of the estates consisted of certain copyhold lands of the manor of Pembridge Foreign, in the county of Hereford, which had been purchased by Lynden Evelyn, and the legal estate in which had been surrendered by a mortgagee to the use of Frederick Evelyn, his heirs and assigns, according to the custom of the manor, in trust for Lynden Evelyn. Frederick Evelyn died in May, 1837. Lynden Evelyn died in April, 1839. Elizabeth Plunkett, a defendant in two of the causes, was the heiress-at-law and according to the custom ; and Francis Evelyn, a plaintiff in two of the causes, and defendant in the other, was the devisee of the real estate, and residuary legatee under the will, of Lynden Evelyn. The will had not been established in this court.

No person appeared to claim admittance to the copyhold premises after the death of Frederick Evelyn. At a court-baron of the manor, held in February, 1844, the homage presented the death of Frederick Evelyn, the last tenant ; and at that and two subsequent courts-baron, in April following, first, second, and third proclamations were made for persons claiming title to the premises to *come in and be admitted. Notices of *[473] the proclamations were served upon the receiver, and the solicitor for the plaintiffs and defendants in these causes. No person applied for admittance, and a precept was, at the third court, issued to the bailiff of the manor, to seize the lands quousque.(b) On the 20th May, declaration in ejectment, in her Majesty's Court of Exchequer, at the suit of the lord of the manor, was served upon the terre-tenant.(c) It did not appear that either the lord or the steward of the manor had been served with a copy of the order appointing the receiver.

Mr. *Romilly* and Mr. *Calvert* moved, on behalf of the receiver, for an injunction to restrain the lord from proceeding with the

(a) See p. 320, ante.

(b) See 1 *Scriven on Copyholds*, p. 353, ed. 3.

(c) *Id.* 356.

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action, or commencing any other action for the like purpose, and that he might be ordered to pay the costs of the application: *Dixon v. Smith*,^(a) *Angel v. Smith*,^(b) *Johnes v. Claughton*,^(c) *Brooks v. Greathed*.^(d) In *Wadmore v. Trevanion*,^(e) a receiver had been appointed over the interest of the lessee in a leasehold estate, and the court restrained the lessor from proceeding to recover on a forfeiture in respect of breaches of covenant, without having previously applied to this court for leave.

Mr. Cooper and Mr. Rolt, for the lord of the manor.

The lord does not, in this case, seek to interfere with the property over which the right of the receiver extends: the receiver is not appointed receiver of the seignior; he is receiver [*474] over that which belongs to the copyholder, not of that which belongs to the lord. In appointing a receiver of the property of a suitor, the court does not interfere with the right of third persons. It will, no doubt, protect its officer from disturbance by parties for the first time setting up adverse claims. This is illustrated by the case of a right of common. Lord Eldon says—"If, when a receiver is appointed, a commoner is in the exercise of his right of common, the appointment does not interfere with it:" *Johnes v. Claughton*. The receiver is bound to attend to the rights of others, and may apply for the direction of the court where he has any difficulty; but the legal rights of all other persons in an estate are not extinguished by the fact of a receiver being appointed of the property of one who has a qualified interest in that estate. The lord is not bound to notice any suits which may be in progress amongst his tenants or persons claiming the copyhold tenements, unless they are suits in the lord's court. All that the lord is bound to know is, that there are certain lands in the manor of which there is no tenant on the rolls, and those lands he is entitled to hold until a tenant shall be admitted.^(f) The proceeding taken by the lord for this purpose

(a) 1 Swans. 457.

(c) Jac. 573.

(e) Not reported.

(f) See 1 Will. 4, c. 65, s. 9.

(b) 9 Ves. 335.

(d) 1 J. & W. 176.

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is not in fact against the receiver ; it is against the terre-tenant. The action has proceeded on further than the declaration, which, in ejectment, is a preliminary step to ascertain with whom the question is to arise. The plaintiff in the action has not moved for a rule against the casual ejector. If, after the receiver appeared, the action was still prosecuted, it would then be a proceeding against the officer of the court ; but it is not so in its present stage, and the motion should be refused with costs. The case of *Wadmore v. Trevanion* goes further than any reported case ; but even there it appears that the *lessor [*475] had been served with the order for the receiver, and he had served the receiver with the declaration in ejectment, neither of which facts occur in this case.

The VICE-CHANCELLOR said that the court did not allow the possession of the receiver to be interfered with or disturbed by any party, whether claiming paramount or under the right which the receiver was appointed to protect.[1] If a party claiming a right in the same subject-matter was in possession of the rights which he claimed at the time the receiver was appointed, the appointment of the receiver left him in such possession ; if, on the other hand, the claimant was out of possession, he must apply for the leave of this court before he instituted any legal proceedings affecting the possession which the receiver had acquired.[1] The court had then an opportunity of considering, and, in a sense, of trying, the right of the applicant to proceed at law, before it sanctioned the proceeding. How far that preliminary trial in this court should go might depend upon the circumstances of the case.(a) Whether the party proceeding at law did or did not know that a receiver had been appointed over the property, or however clear the right of the claimant might be, the court would

(a) See 9 Ves. 339.

[1] That a receiver represents the interest of all the parties in the property, and that it is his duty to protect it to the best of his ability, for all those interested, although that interest may be various and conflictive or involved in doubt. See *Iddings v. Bruen, and others*, 4 Sandf. Ch. Rep. 417 ; *Hutchinson v. Lord Massareene*, 2 Ball & Beat. 55 ; *Davis v. Duke of Marlborough*, 2 Swan. 125 ; *Delany v. Mansfield*, 1 Hogan, 234.

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restrain the prosecution of the claim, if it were instituted without the leave of this court. The court had the power of indemnifying a party who applied in a regular manner for the protection of his rights, or to have them put in a train for adjudication.^(a) The injunction in this case must be granted, but it was not a case for costs.

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*GRIFFITH v. RICKETTS.

1844: 17th, 18th, and 20th April.

The 49th Order of August, 1841, does not dispense with the necessity of stating, in a bill of revivor, so much of the pleadings in the original suit as is sufficient to show the title of the plaintiff, as against the defendant, to revive the suit.

If the statements in the bill of revivor do not show a title to revive, the plaintiff cannot on demurrer supply the defect by reading the record of the original bill, although that record be referred to in the bill of revivor.[1]

The title to revive the suit against the defendant is not shown by the mere statement, that such defendant is the representative of a party who had answered the original bill.

The plaintiff cannot, on demurrer, sustain the bill by waiving the relief prayed against the demurring defendant.

Where, consistently with the statements in a bill of revivor, the defendant might have been made a party either to receive or pay what was due to her from the estate of which she was the representative, or to account for her own receipts, but it did not appear whether she was a party for any of such purposes, or in what character she was brought before the court, her demurrer was allowed.

THE bill, which are filed by Albina Griffith, the devisee of E. Griffith, against Richard Ricketts the younger, Caroline Rosina Frost, and Henry Ricketts, stated, that Edmund Griffith, on or about the 3rd of February, 1827, exhibited his original bill against W. P. Lunell, Richard Ricketts the younger, and Eliza-

(a) See *Thomas v. Brigstocke*, 4 Russ. 64. Doubts formerly existed whether copyhold lands were subject to sequestration: 3 Swans. 282, 294, 298, n. And regard to the interests of the lord seems to be the ground on which partition of copyholds has been refused: *Horncastle v. Charlesworth*, 11 Sim. 315. See also the preceding case.

[1] *West v. Hall*, 3 Har & John 221.

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beth his wife, Isaac Leonard, John Leigh Frost, and Ann his wife, stating, amongst other things, that certain hereditaments therein mentioned were, by indentures of lease and release, dated the 5th and 6th of December, 1800, respectively, conveyed by way of mortgage to Richard Ricketts, and that Richard Ricketts subsequently entered into the possession of the said mortgaged premises, and, in or about the year 1812, let one Solomon Moore into possession of the same premises, and stating that Solomon Moore continued in such possession until his death, and that thereupon John Leigh Frost and Ann his wife (the daughter and administratrix of Solomon Moore) came into such possession, and had continued in such possession ever since; and also further stating the death of Richard Ricketts, having by his will appointed W. P. Lunell, Richard Ricketts the younger, (in the said bill stated to be the heir-at-law of Richard Ricketts,) and Isaac Leonard his executors, and prayed that Edmund Griffith might redeem and have a reconveyance of the said hereditaments, and in order thereto, that an *account might [*477] be taken of what was due upon the said indentures of the 5th and 6th of December, 1800, for principal and interest, and also an account of the rents and yearly produce of the said hereditaments during the time that Richard Ricketts and his said executors and John Leigh Frost had been in possession thereof; and that the said executors and John Leigh Frost and Ann his wife might be charged with the rents of the said hereditaments received by them, or which, but for their own wilful default, might have been received by them; and that all necessary accounts might be taken of the respective personal estates of the said Richard Ricketts, deceased; and the usual directions for reconveyance on redemption, by the said Edmund Griffith paying what, if anything, might be found due on the said mortgage security; and for a receiver and injunction in the meantime. That the said executors and John Leigh Frost and Ann his wife put in their answers (now as of record) to the said bill; that the statement in the said bill, that Richard Ricketts the younger was the heir-at-law of Richard Ricketts, was erroneous, for that one Elizabeth Ricketts was such heiress-at-law, and on the death of Richard Ricketts, the legal estate in the mortgaged

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premises descended to, and was vested in the said Elizabeth Ricketts: that the said plaintiff Edmund Griffith died the 15th of June, 1835, intestate, whereupon the said suit and proceedings became abated, and E. Griffith, the heir-at-law of Edmund Griffith, and late husband of the plaintiff, became entitled to the equity of redemption of the mortgaged premises; and the said E. Griffith died the 8th of December, 1842, having by his will given and devised all his real and personal estate to the plaintiff, his widow: that W. P. Lunell and Isaac Leonard had died, leaving Richard Ricketts the younger the sole surviving executor of Richard Ricketts: that the said Elizabeth Ricketts [*478] had died, leaving the defendant *Henry Rickett, in whom the legal estate of the said mortgaged premises was now vested, her heir-at-law: that John Leigh Frost died in October, 1836, intestate, and letters of administration to his estate and effects were granted to Ann Frost, his widow, who had got in all his personal estate: that Ann Frost was the sole next of kin of Solomon Moore, and the said Ann Frost died on the 16th of July, 1842, having by her will appointed her daughter, the defendant Caroline Rosina Frost, her sole executrix, who, in September, 1842, duly proved the will; and was the sole legal personal representative of Ann Frost, and entitled to letters of administration to the personal estate of Solomon Moore: that, immediately on the death of Ann Frost, the defendant Caroline Rosina Frost entered into possession or receipt of the rents and profits of the said mortgaged premises, and continued in such possession and receipt, and had received considerable sums on account thereof, and letters of administration *de bonis non* of Solomon Moore were subsequently granted to her: that the plaintiff was entitled to have the said suit and proceedings revived against Richard Ricketts the younger and Caroline Rosina Frost, and that Caroline Rosina Frost ought to account to the plaintiff for the rents and profits of the mortgaged premises received by her or by the said Ann Frost, or which, without their respective wilful default, might have been received. The bill prayed that the said suit and proceedings so abated as aforesaid might be revived against the defendants Richard Ricketts the younger and Caroline Rosina Frost, and be in the same plight and condition as at the

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time of such abatement, and that the plaintiff might have the benefit thereof; and that an account might be taken of the rents and profits of the said mortgaged premises received by the defendant Caroline Rosina Frost, and that she might either admit assets of Ann Frost sufficient to answer *anything [*479] that might be found due to the plaintiff from the estate of Ann Frost, or that an account might be taken of the personal estate of Ann Frost come to the hands of the defendant Caroline Rosina Frost, and that the same might be applied in a due course of administration, and that the plaintiff might have such relief against the defendant Henry Ricketts as was prayed by the said bill against Richard Ricketts the younger, as heir-at-law of Richard Ricketts, deceased, in respect of the legal estate in the said mortgaged premises.

The defendant Caroline Rosina Frost demurred to the bill, for want of equity.

Mr. *Romilly* and Mr. *Osborne*, for the demurrer, contended that there was no statement in the bill showing any title to revive the suit against Caroline Rosina Frost. They referred to the cases of *Foster v. Hodgson*,^(a) *Frietas v. Dos Santos*,^(b) *Woods v. Woods*,^(c) *Phelps v. Sproule*.^(d)

Mr. *Tinney* and Mr. *Pirie*, in support of the bill, (besides insisting upon the effect which they argued ought to be given to the several statements in the bill,) relied on the order XLIX of August, 1841, as dispensing in the bill of revivor with the statements in the pleadings in the original suit. They referred also to *Metcalfe v. Metcalfe*,^(e) Story, Com. Eq. Pl., pl. 384, p. 253; and Ld. Redes. Tr. Pl., p. 56, ed. 4.

*VICE-CHANCELLOR:—It is always necessary that a [*480] bill of revivor should contain statements showing the right of the plaintiff to revive the suit against the defendants; and the question is, whether the statements in this bill are suffi-

(a) 19 Ves. 180.

(b) 1 Y. & J. 574.

(c) 10 Sim. 197.

(d) 4 Sim. 318.

(e) 1 Keen, 79.

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cient to show the right to revive. What statements are necessary for that purpose must of course depend upon the circumstances of each particular case. It may sometimes be unnecessary to state in a bill of revivor any of the statements in the original bill; as, for example, in a common creditor's suit against the personal representatives of the deceased debtor, praying the usual accounts, and nothing more. After the answer of such personal representative has been put in, the statement that the plaintiff filed his bill, the character in which he filed it, and the prayer, and that the defendants to the original bill (stating in what character they were sued) answered the bill and died, and that the defendant to the bill of revivor had obtained probate or letters of administration (as the case might be) to the debtor against whose estate the accounts were prayed, might be a sufficient statement. In other cases all the allegations of the original bill may be necessary to be repeated. But, on the other hand, it was not necessary that the plaintiff in a bill of revivor should state more than would show his title to revive. However, before the orders of August, 1841, a practice had grown up of stating at great length in all bills of revivor the very case made by the original bill—thereby occasioning, in the majority of cases, great and unnecessary expense to the suitor. Whether this practice arose, as it has been suggested, from a passage in

Lord Redesdale's Treatise,^(a) or whether it arose, as it [*481] was said to have done, from some decisions of Sir John

Leach, it was to correct the practice that the 49th order of August, 1841, was made. It was at first thought that the proper way of correcting the practice objected to was by a decision of the court declaring the proper course of the court in such cases; but, as the practice had become established, and it was not likely that any suitor would be advised to incur the risk of a demurrer, and the expense of an appeal, only to correct the practice of the court for the good of others, Lord Cottenham made the 49th order. The intention of that order was merely to get rid of the practice I have referred to, and restore the old practice; it was not intended to dispense with the necessity of

(a) See White on Supplement and Revivor, p. 102.

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stating enough to show the title to revive : the concluding words of the order, in fact, point to that necessity.(a)

In this case the defendant Caroline Rosina Frost, who has demurred, is the personal representative of Solomon Moore, and also of Ann, the wife of John Leigh Frost. The bill is for redemption, and Caroline Rosina Frost may be a defendant to the bill for one of three purposes : first, to receive what, if anything, may be due to Solomon Moore or to Ann Frost ; secondly, to pay what, if anything, may be due from Solomon Moore or Ann Frost ; or, thirdly, to account for her own receipts since the death of Ann Frost.

With regard to the first purpose which I have suggested, it does not appear what beneficial interest Solomon Moore or Ann Frost had, if in fact they had any, in the subject of the suit. The bill states only that they were let into possession, and that no conveyance was executed to either of them. Consistently with this statement, *it may be that neither of [*482] them had any beneficial interest, or that they had none which survived to Solomon's Moore's estate, or accrued to Ann Frost at his decease, or which survived to Ann Frost's estate. So far it does not therefore appear from this statement that there was any ground for making Ann Frost a party to the suit. With respect to the second purpose for which the defendant might be a necessary party to the bill of revivor, it must be observed that there is no prayer that Solomon Moore or his estate might account ; and such a prayer cannot be intended under the prayer for general relief, unless it would be a necessary result of the statements made upon the pleadings. Now, there is no suggestion that Ann Frost received anything after her husband's death, and it is plain she would not be accountable for her husband's receipts. So far, therefore, as regards any information which the bill gives me as to the purpose for which Ann Frost was a defendant in the original suit,—whether it was to receive or to pay,—whether in respect of some beneficial interest in Solomon Moore, as his administratrix, (which this bill says she was,)—whether in respect of some interest her husband claimed in

(a) Beav. Ord. Can. 178.

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her right after Solomon Moore's death,—or whether as an accounting party,—I am left in entire ignorance upon the present record. It may have been for some or one of these purposes that she was made a defendant; but upon the statements in this bill, there is nothing to show what the purpose was. But it was said, that, on this occasion, it was too late to enter into those questions; that Ann Frost was a defendant to the original bill, and had answered with her husband; and that that alone was sufficient to entitle the plaintiff to revive the suit. I cannot come to that conclusion. It was her husband's answer, and not her's;

and without knowing for what purpose she was made a
[*483] defendant, it is impossible to say with certainty *how far (if at all) she was bound by her husband's answer after his death. If, however, I take the answer to have been the answer of Ann Frost, and binding upon her, my conclusion would still be the same. Unless bills of revivor are exceptions to all other bills, the plaintiff is bound to let the defendant know for what purpose such defendant is brought before the court. In this case, the present defendant is entitled to know whether it is as the representative of Solomon Moore or Ann Frost that she is made a party, and, in either case, for what purpose. Unless this is shown, I think the bill of revivor does not show a title to revive. It does not show that the purpose for which Solomon Moore or Ann Frost were made parties necessarily gives a right to proceed against the estate of either. I may observe, that, according to the charges in this bill, it would appear that Caroline Rosina Frost is brought before the court in respect of some demand which the plaintiff supposes he has against the estate of Ann Frost, and not as administratrix of Solomon Moore, or in respect of his estate. The bill charges, that the defendant ought to account for the rents and profits of the mortgaged premises received by Ann Frost, and that she ought to admit assets of Ann Frost sufficient to answer the same, or that an account of the estate of Ann Frost might be taken. If the charges in the bill must be so construed as to exclude relief against the estate of Solomon Moore, the case is clear.

It is not necessary that I should advert to the third purpose for which Caroline Rosina Frost might have been possibly made

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a party,—that is, to account for her own receipts of the rents and profits since the death of Ann Frost,—further than to say, that this bill of revivor is clearly not founded upon any such merely personal *claim against the defendant, nor [*484] was the title to revive put upon that ground in the argument at the bar.

It was said, that the difficulty, if any, which arose from the defective statement of the case on the bill of revivor, might be obviated by turning to the record of the original bill. In the case of *Campbell v. Mackay*,^(a) Lord Cottenham said, that there might be a difference in the effect of the statement upon the bill of a deed, and of a matter of record, as in the latter case the court could test the accuracy of the statement; but that observation does not apply to this case, for, if the statements of the bill of revivor are to be explained by importing into it the statements of the original bill, it is obvious that the defendant to the bill of revivor cannot safely demur, until he has taken a copy of the original bill, and ascertained whether he can sustain his demurrer upon the statements which it contains. I am of opinion that the demurrer must depend upon the bill of revivor, without reference to the statements of the original bill further than they appear upon the bill of revivor.

It was suggested, on the part of the plaintiff, that the relief against Caroline Rosina Frost might be waived, and the bill thereby sustained. That might be done at the hearing, but not upon demurrer. If, in the latter case, the waiver of relief were sufficient, few demurrers would be supported. The plaintiff may have leave to amend her bill upon payment of the costs of the demurrer.

(a) 1 Myl. & Cr. 613.

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[*485]

*HEPWORTH v. HESLOP.

1844 ; 20th and 22nd April.

The mortgagee or incumbrancer, consenting to a sale of the mortgaged premises in an administration suit, does not thereby waive his right to be paid his principal, interest, and costs out of the moneys produced by the sale, in priority to the costs of the plaintiffs in the cause.

A CREDITOR'S suit. The estate was insolvent. At the hearing the usual inquiry was directed as to what real estate the testator died seised of, and a sale thereof was directed ; and if the master should find any part of such real estate subject to any mortgage or incumbrance, and the mortgagee or incumbrancer should consent to a sale, then it was declared that such mortgagee or incumbrancer ought, in the first place, to be paid out of the purchase-money arising from the sale of the mortgaged premises ; and the master was to take an account of the principal and interest due on any such mortgage.

The master, by his separate report, found, that the real estate therein mentioned was conveyed by the testator to William Ayston by way of mortgage, to secure 800*l.* and interest, and that the testator had also deposited the deeds and muniments of the copyholds with E. M. and S. Colbeck, to secure 200*l.* and interest ; that William Ayston and the survivors of the Colbecks were willing, and had consented to concur in a sale of the said estates ; that he had caused the same to be sold, and had allowed certain persons the purchasers thereof respectively, as therein mentioned. The report was confirmed, and the purchase-money paid into court.

The mortgagees, Ayston and the Colbecks, who were not parties to the cause, now presented their petition, praying that their costs, charges, and expenses, in respect of the sale and conveyance to the purchaser, and of the petition, might be taxed and paid out of the purchase-moneys in court ; and that the sums so due to them respectively for principal and interest might

[*486] be paid to *them out of the residue of such purchase-moneys, so far as the same would extend.

Mr. *Kenyon Parker*, for the petitioners.

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Mr. *Willcock*, for the plaintiff, submitted, that the costs of the plaintiff in respect of the sale ought to be paid out of the purchase-moneys prior to the payment of the principal and interest due on the mortgages. The estate being insolvent, the mortgagees had, by the sale, escaped the costs of a foreclosure suit for the purpose of realizing their securities; and the sale had been with their consent, and for their benefit: *Kenebel v. Scrafton*,^(a) *Brace v. Duchess of Marlborough*,^(b) *White v. Bishop of Peterborough*,^(c) *Upperton v. Harris*,^(d) *Tipping v. Power*,^(e) *Aldridge v. Westbrook*.^(f)

VICE-CHANCELLOR:—I think the testator, the mortgagee, is entitled in this case to be paid his principal, interest, and costs, including his costs of the sale, in preference to any claim of the parties in the cause.

That a mortgagee is entitled to his principal, interest and costs, as against the mortgagor, and *puisne* incumbrancers claiming under the mortgagor, cannot, as a general proposition, be disputed. But it was said that in this case the mortgagee, consenting to a sale, had thereby, to the extent at least of the costs of the sale, lost his priority, and that the expenses of the sale should "at all events, come out of the [*487] proceeds of the sale in the first instance; and *Kenebel v. Scrafton*^(g) was referred to. I am not of that opinion.^c The only grounds upon which the plaintiff in the cause can successfully contend that he has a right to be paid his costs of the sale, out of the proceeds of the sale, to the prejudice of the mortgagee, must be, either that such costs are properly administration costs in the cause, or that the sale has been for the benefit of the mortgagee. Now, on what principle can I consider the costs of sale as administration costs, so as to affect the priority of mortgagee? The object of the suit is to administer the estate of the deceased debtor, subject to the mortgage. The equity of redemption only is the subject of administration in the suit. The plaintiff has, in the absence of the mortgagee, obtained the decree to

(a) 13 Ves. 370.

(b) Mos. 50.

(c) Jac. 402.

(d) 7 Sim. 444.

(e) 1 Hare, 410.

(f) 5 Beav. 188.

(g) 13 Ves. 370.

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sell the estate, subject to the mortgage, or free from incumbrances, with the consent of the mortgagee. The mortgagee consented that the estate should be sold free from incumbrances. How can such a consent have the effect of subjecting the security of the mortgagee to the costs of the sale ordered by the decree? I can see no ground for it. The consent of the mortgagee, that the mode of administering the equity of redemption shall be by a sale of the estate, free from incumbrances, is no waiver of his priority; although, where the sale is peculiarly for his benefit, it may possibly be otherwise,—which may explain some of the cases. If *Kenebel v. Scrafton* be an authority to the contrary, it will, as far as my experience goes, be found to have been overruled in practice; for which *Upperton v. Harrison*(a) and *Aldridge v. Westbrook*(b) are authorities. In

Tipping v. Power,(c) I had occasion to consider, but [*488] not to decide this point; and I then satisfied myself that the mere circumstance that a mortgagee concurred in a sale would not deprive him of the ordinary rights of a mortgagee as to costs. There must be some special circumstances to produce that effect.

It was said, that the mortgagee not being a party in the cause made a difference, and that *Kenebel v. Scrafton* turned upon that circumstance. Now I should have thought the present case stronger for the mortgagee:—when he is a party in the cause, there might be some color for saying his mortgage is the subject of an administration suit, but that clearly cannot be said where he is not a party. In neither case, however, does the mortgagee waive his priority by merely consenting to a sale. The plaintiff in this cause would have incurred the same expenses by attempting to sell the estate subject to the mortgage, as by selling it free from incumbrances.

(a) 7 Sim. 444.

(b) 5 Beav. 188.

(c) 1 Hare, 410.

1844.—M'Gregor v. Topham.

M'GREGOR v. TOPHAM.

1844: 31st January; 12th, 17th, 19th, and 20th February; 11th Nov.

The influence upon the minds of the jurors, which might possibly be produced by the reputation of a material witness on a trial, in affecting the relative credit to be given to the testimony of that and the other witnesses, is no ground of changing the venue from the county or neighborhood in which such material witnesses resides and is best known.

THE plaintiff Cordelia M'Gregor, the wife of the plaintiff Patrick M'Gregor, was the customary heiress of Richard Wrightson, who died in 1831, seised of lands situated in the manor of Bondgate, in Darlington, in the county of Durham. The defendant Eliza Henrietta was the widow of Richard Wrightson, and afterwards the wife of the defendant Thomas Topham. The bill, which was filed in July, 1842, suggested a pretence on the part of the defendants, that Richard Wrightson, on the 29th of December, 1829, executed a paper writing as his will, and *that his execution thereof was attested on the same day [*489] by several witnesses who were present when he executed such paper writing, and that he thereby devised all his freehold and copyhold estates whatsoever to the said Eliza Henrietta Topham, her heirs and assigns, for ever; and that the defendants further pretended that Eliza Henrietta Topham, by virtue of such alleged will, was entitled to make a settlement of the said copyhold premises as therein mentioned, and to procure the same to be surrendered to the trustees of the said settlement, upon the trusts thereof, as in the bill mentioned. The bill prayed a declaration, that, upon the decease of Richard Wrightson, the said copyhold hereditaments within the manor of Bondgate descended to the plaintiff Cordelia M'Gregor, as his customary heiress-at-law, and that the defendants might be decreed to deliver up possession of the same to the plaintiffs in right of the plaintiff Cordelia M'Gregor; and that the defendants, the trustees, might be decreed to surrender the same to the use of the plaintiffs, or to trustees for them, and to come to an account for the rents and profits: and if the defendants should set up any such will of Richard Wrightson, then that it might be ascertain-

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ed whether any such will was or not duly signed and published by him, whilst of sound and disposing mind, memory, and understanding, and that, if necessary, an issue might be directed, or that the plaintiffs might be at liberty to bring ejectment, and the defendants might be restrained from setting up the legal estate vested in the said trustees in bar of, or as a defence to such issue or action.

The will was dated the 29th of December, 1829, and the execution by Mr. Wrightson was attested by Francis Mewburn, the solicitor who drew the will, and George Hind and Jane Fenny, who were two of the domestic servants of Mr. Wrightson. Mr. Mewburn, by his depositions *taken in the cause, testified to the perfect competency of Richard Wrightson, at the time of making his will, and affirmed its due execution; and the two other attesting witnesses, Hind and his wife, (Jane Fenny having become the wife of Hind,) deposed that Richard Wrightson, at the time they were requested to sign, and did sign their names to the paper writing in question, as such attesting witnesses thereto, was in a state of insensibility from intoxication, and that the name of Richard Wrightson thereto was not in his handwriting.

At the hearing of the cause in January, 1844, an issue *devi-savit vel non* was directed to be tried at the then ensuing assizes, for the county of Durham.(a)

Mr. *Anderdon* and Mr. *Martin*, for the plaintiffs, moved to change the venue to Westminster, or to some county other than Durham, Northumberland, or York.

Mr. *Roupell*, Mr. *Smythe*, and Mr. *Addison*, for the defendants, opposed the motion.

The grounds of the application and of the opposition to it, as they were presented to the court, will appear from the judgment.

(a) The issue was asked for by the plaintiffs, and submitted to by the defendants, without any question being raised whether the proper proceeding was to direct an issue, or allow the plaintiffs to bring an ejectment, restraining the defendants from setting up their legal estate independent of the devise. See 3 Mbr. 171.

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The authorities cited were, *Hill v. Payne*,^(a) *Doe d. Lloyd v. Williams*,^(b) *Seeley v. Ellison*,^(c) *Davis v. Lowndes*,^(d) *Pybus v. Scudamore*,^(e) **Thornton v. Jennings*,^(f) [*491] *The King v. Holden*,^(g) *Petyt v. Berkley*,^(h) *Wright v. Tatham*,⁽ⁱ⁾ 3 Blackstone, Com. 359; 1 Starkie Evid. 13, 14; Lush, Prac. 352.

Feb. 12th.—VICE-CHANCELLOR :—An application was made at the last seal, by the plaintiffs in equity, to change the venue from Durham to London, upon a suggestion, that a fair and impartial trial could not be had at Durham, York, Northumberland, or Newcastle-upon-Tyne; and that the expense and inconvenience of trying the issue at Lancaster or Liverpool would be greater than trying it in London. It was suggested also that the defendants in equity would have to examine few, if any witnesses, except Francis Mewburn.

The plaintiff's affidavit was met by an affidavit on the part of the defendants, from which it appears, that the capacity of Mr. Wrightson to make a will before the date of the will in question is a material issue in the cause, and that the trial of such issue will involve the necessity of examining a great number of witnesses besides Mr. Mewburn. In consequence of this, (as I understand,) or for some other reason, the plaintiff's counsel abandoned their motion so far as it proposed that the issue should be tried in London, and proposed that it should be tried at York. This has certainly placed me in considerable difficulty, unless I can be satisfied that no case is made for changing the venue from Durham; for there is not a word in the plaintiff's affidavit which can be relied upon as a reason for not trying the issue at Durham which will not equally apply to York. The only question which the argument has left for my *consider- [*492] ration is that which I reserved,—whether, leaving the issue to be tried at Durham, I should give any special directions

(a) 3 Dow. Pr. C. 695.

(b) 5 Bing. N. C. 205; 7 Scott, 143.

(c) 6 Bing. N. C. 229; 8 Dow. Pr. C. 266; 8 Scott, 498.

(d) 4 Bing. N. C. 711.

(e) 7 Scott, 124.

(f) 5 Bing. N. C. 485.

(g) 5 Barn. & Adol. 347.

(h) Cowp. 510.

(i) 2 R. & Myl. 1.

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(as was done in *Tatham v. Wright*) for the purpose of preventing the jury from being composed of persons resident at Darlington or its immediate neighborhood.

The ground of the application is of an unusual character. It is not that the success either of the plaintiff or the defendants in the issue is a subject of interest to any of the persons of the county, but that the trial will involve the general character of one of the attesting witnesses to the will, and that his personal character is such an object of interest in the four places objected to, that a fair and impartial trial cannot for that reason be expected. And I will not say, that, if the evidence now before me were such as to support the suggestion, I should think myself justified in refusing the application, or such modification of it as I have referred to, with reference only to the cause from which unfairness and partiality were to be apprehended.

The only witnesses in support of the application are the plaintiff M'Gregor and his London solicitor. The only knowledge upon the subject which the latter possesses appears to have been derived from ten days' residence at Darlington, upon the occasion of executing the commission for the examination of witnesses in the cause; and if the trial were to be at Darlington, and the jurors were to be selected out of Darlington, and not out of the body of the county, his evidence might be entitled to more weight than I now think should be given to it. I cannot regard the application as supported by any evidence except that of the plaintiff himself.

Now, I remain of the opinion which I before expressed, [*493] that, if the objection cannot be carried higher than this, that the witnesses will be known in person and character to the jurors, that is no ground for changing the venue. If the evidence led me to the conclusion that there was reasonable ground for apprehending that the jury would be in part composed of persons who, from their connexion with Mr. Mewburn, or otherwise, would be disposed to support the will, whether his evidence were true or false, or without fairly trying the character of that evidence, I should strongly have desired to grant the plaintiff's application. But, considering out of how large a mass of population the forty-eight jurors must, in the first

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instance, be selected,—that, unless out of that forty-eight (to be selected without the possibility of favor or partiality) more than twelve should be of the character which the plaintiff's objection supposes, the plaintiff's suggestion must be groundless; and, considering also that the place of trial will be eighteen or twenty miles from Darlington, I think I should be making applications of this nature too much a matter of course if I were to grant it to any extent.

Costs of the motion reserved.

Feb. 17th.—A motion was now made on behalf of the plaintiffs, that the cause might be ordered to be tried at the sittings in London or Westminster, the plaintiffs offering to abide such order as the court might make in respect of the extra costs of the defendants, occasioned by the examination of their witnesses in London: or that the cause might be tried at York, by a jury chosen from the West Riding, or in any county other than Durham.

Mr. *Anderdon* and Mr. *Martin*, for the motion; and Mr. *Roupell*, Mr. *Smythe*, and Mr. *Addison*, *contra*.

*VICE-CHANCELLOR, after observing, that the applica- [*494]
tion to change the venue was rested, in the first place,
upon the influence or supposed influence of Mr. Mewburn in
the county; and that the imputation, that Mr. Mewburn
would actively use that influence in an improper manner, had
been repudiated by the counsel for the plaintiffs; and that,
rejecting the direct and active exercise by Mr. Mewburn of
any influence he might possess, the question remained as to
influence of a different character:—

Now, upon that I have, as to one point, already expressed an
opinion. I am of opinion, without any reserve or qualification,
that the mere fact, that Mr. Mewburn, and such character as he
has earned in life, whether good or bad, are known throughout
the county of Durham, independently of the act brought into
question in this cause, is no ground for changing the venue. It
is one thing for the character of a witness to be known, which

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Blackstone seems to think conducive to justice, and another for the jury to bring prejudices and partialities to the trial of the right, which it was the object of the statute of Anne(*a*) to remedy.

[His Honor then proceeded to consider the weight to be attributed to the affidavits in support of the application, with reference to the opinions expressed by the deponents, that a fair trial could not be had in the county of Durham,—as to the relations and connexions of Mr. Mewburn in the county,—his extensive practice, and *numerous clients, among others land-owners and railway companies,—the excitement said to prevail in the neighborhood with regard to the subject of the trial,—and the allegation, that betting had taken place on the result.]

There is nothing in these facts, explained as they are by the affidavits on behalf of the defendants, calculated to raise a presumption that prejudice or partiality can reasonably be supposed to affect a special jury chosen from the body of the county. So far am I from drawing that conclusion, that, were I upon a jury in which a professional man, in whom I had been in the habit of confiding, stood charged with the conduct with which, in this case, Mr. Mewburn stands charged, I should most strictly watch the evidence for the very purpose of ascertaining whether my previous confidence had, or had not, been misplaced. With regard to the degree of excitement or interest produced in the mind of the public, from which the jurors are to be selected, attending to the position in which the witnesses stand, and to the limited local range which they give to the supposed excitement, I cannot think the apprehensions of the plaintiffs have any just foundation,—that a jury, coming from the body of the county, may not safely be trusted with the decision of the question in this issue. I think the observation of a learned judge in one of the cases cited was well applied to this case. The party in the cause

(*a*) 4 & 5 Ann. c. 6. *Fortescue*, (De Laud. L. L., c. 26,) treating of the advantages of the English mode of trial, adverts to the knowledge of the character of the witnesses as one of the qualifications of the jurors which fit them to be judges of the fact: "*Isti omnia sciunt, quæ testes deponere norunt, et isti testium productorum agnoscunt constantias, inconstantiasque, et famam.*"

1844.—M'Gregor v. Topham.

erroneously supposes the world to take that interest in the question which he naturally takes in it himself. I regret that I cannot, for the satisfaction of the plaintiffs, induce the defendants to change the venue to York; but I cannot do it adversely.

Motion refused with costs.

The counsel for the defendants consented that jurors *residing within five miles of Darlington should be ex-cluded. [*496]

The issue was tried at the Spring Assizes for the county of Durham; and the jury found that Richard Wrightson did, by the said paper writing, devise his estate and interest of and in the said copyholds lands and tenements in manner and form alleged.

June 24, 26, 28, 29, July 6.—The plaintiffs moved for a new trial of the issue *devisavit vel non*, and that such trial might be ordered to be held in London or Middlesex, or such other place as the court should direct.

Mr. *Kelly*, Mr. *Anderdon*, Mr. *Martin*, and Mr. *Crompton*, were heard in support of the motion; and Mr. *Knowles*, Mr. *Wortley*, Mr. *Romilly*, Mr. *Smythe*, and Mr. *Addison*, contra. The cases of *Earl of Darlington v. Bowes*,^(a) *Pemberton v. Pemberton*,^(b) *White v. Wilson*,^(c) *Locke v. Colman*,^(d) *Wilson v. Beddard*,^(e) and *O'Connor v. Malone*,^(f) were referred to.

November 11th.—THE VICE-CHANCELLOR, after minutely weighing the evidence given at the trial, and the affidavits made in support of the application, refused the motion.

(a) 1 Eden, 270; and see cases cited in the notes thereto.

(b) 11 Ves. 50.

(c) 13 Ves. 87.

(d) 2 Myl. & Cr. 42, 635.

(e) 12 Sim. 28.

(f) 1 Maclean & Robinson, 468.

1844.—Munday v. Knight.

[*497]

*MUNDAY v. KNIGHT.

April, 19th, 23rd, 24th, and 26th.

A general charge of fraud is to be referred to, and explained by, the particular allegation of fraud which the bill contains ; but, if there be no definite or specific charge of fraud, a vague charge—where the facts alleged may or may not amount to a fraud—will not sustain the bill upon demurrer.

THE bill stated, that W. B. May, by his will, dated the 19th of July, 1726, devised and bequeathed his manor of Godmersham, and all other his estate and property unto and to the use of T. Broadnox, his heirs, executors, &c., upon trust out of the rents, issues, and profits thereof, to maintain and educate Thomas May, the only child of the said testator, during his infancy, and to lay out and invest the surplus ; and that the testator devised and bequeathed the said manor and other estate and property, and the said surplus income, to the said Thomas May, his heirs, executors, &c., on his attaining twenty-one ; and that the testator appointed T. Broadnox his executor and guardian of his said son during his minority : that the testator died in 1726, leaving Thomas May, his son, then an infant of nine months old ; and his will was proved by T. Broadnox, who took possession of the real and personal estates of the testator : that T. Broadnox placed the said Thomas May under the care of a nurse, to whom he from time to time paid small sums of money for the bare maintenance of herself and the said Thomas May, and caused the said Thomas May to be brought up in poverty and without education, for the purpose of, and thereby succeeded in, keeping him in ignorance of his rights under the will of the testator : that T. Broadnox assumed the surname of May, to give color to his being owner of the estates ; and that he afterwards took the name of Knight : that the said T. B. Knight, until his death, supplied Thomas May from time to time with small sums of money out of the income of the said estates for his support, and applied the residue of such income to his own use : that T. B. Knight died in 1781, and his son

[*498] Thomas Knight entered into possession *of the said estates by virtue of some deed or will which the defendant

1844.—Munday v. Knight.

refused to discover: that Thomas Knight, until his death, supplied Thomas May with small sums of money for his support: that Thomas Knight died in 1794, and Catherine his widow, entered into possession of the said estates: that in 1797 Catherine, in consideration of 40,000*l.* paid to her by the defendant, (then E. Austin,) released to him her alleged interest in the said estates: that the defendant thereupon took the name of Knight, to give a color to his being owner of the said estates, and entered into possession thereof, and still continued in such possession: that the defendant supplied Thomas May, until his death, with small sums of money, out of the income of the said estates, and applied the residue of such income to his own use: that Thomas May died in 1825 intestate, leaving Elizabeth, his only child, the late wife of the plaintiff, surviving: that the said Elizabeth died in 1828, leaving the plaintiff tenant by curtesy of the said estates.

The bill charged, that the said Thomas Knight, and Catherine his wife, and the defendant, instead of delivering up possession of the estates to Thomas May, as they ought to have done, took advantage of his ignorance of his rights under the will of the testator, and received the income of the said estates, only paying him such small sums as aforesaid: that Thomas May was illiterate, and was, by the fraudulent contrivances of the said Thomas Knight, Catherine his widow, and the defendant, kept in ignorance of his rights under the said will. The bill charged, that the defendant threatened to set up a term of years, created in 1720, and which he alleged was vested in his trustee, by way of defence to an action of ejectment, which the plaintiff intended to commence against him for the recovery of the said manor and estates: that the plaintiff could not safely proceed to trial *in the said action without discovery of [*499] the said matters; and it prayed such discovery, and that the defendant might be restrained from setting up the term in bar to the ejectment.

The defendant demurred.

Mr. *Romilly* and Mr. *Baily*, for the demurrer, said, that the

1844.—Munday v. Knight.

trust estate, under the will, determined in 1747, when Thomas May attained his age of twenty-one years: 2 Jarman on Wills, 213; *Doe dem. White v. Simpson*.^(a) The possession was adverse from that time; and the alleged claim was therefore barred by the Statute of Limitations, (3 & 4 Will. 4, c. 27:) *Foster v. Hodgson*.^(b) The charges of fraud were too vague and indefinite to take the case out of the operation of the statute.

Mr. *Cooper* and Mr. *Stevenson*, in support of the bill, argued that the charges of fraud were sufficiently distinct; but, if not, that the payment of some part of the rents and profits to Thomas May, during his life, kept the claim on foot until his death in 1825; and therefore, in either view, the bill was sustainable.

VICE-CHANCELLOR, after adverting to the allegations of the bill, and the impossibility that the plaintiff, or any person now living, should have made such allegations upon his own knowledge, after the time which had elapsed since the fraud was said to have been committed, proceeded:—

The bill is one upon which no discovery can be expected. [*500] *The plaintiff, however, is entitled to the benefit of the allegations appearing upon it, the truth of which the demurrer admits. I am bound, however, in this case, to apply the rule that the intendment must be against the pleader. According to the allegations of the bill, the property has been held under an adverse title for more than half a century prior to the filing of the bill. The case, therefore, is within the 3d section of the 3 & 4 Will. 4, c. 27, and the onus of taking the case out of the operation of the statute lies upon the plaintiff. This can be done only in two ways:—first, by showing that T. Broadnoxe held the property on an express trust; or, secondly, by proving that he kept possession of the property by a concealed fraud, which could not, by reasonable diligence, have been discovered. The demurrer must be allowed, unless the case can be brought under one or the other of these exceptions. It was admitted

(a) 5 East. 162.

(b) 19 Ves. 180

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that the trust as to the lands ceased in 1746. That was the effect of the limitations contained in the will, for although the lands were devised to T. Broadnox in fee, yet there was no direction to convey them to Thomas May when he should attain the age of twenty-one years. There was no act to be done by T. Broadnox, and the limitations were admitted to be the same in effect as if the devise had been to T. Broadnox until the infant attained the age of twenty-one, without remainder to the infant on attaining that age. Until Thomas May attained twenty-one, no doubt there was a trust, and, if T. Broadnox had been alive, there might have been a question on the title to relief, for there was a trust for the accumulation of the rents and profits, with respect to which he might have had to account. The bill, however, is silent, as to that part of the case. It alleges that the rents and profits of the property were applied by T. Broadnox to his own use; but no relief is prayed in respect to that part of the trust. Supposing even that *a trust did exist, it certainly would have ceased alto- [*501] gether when the possession became adverse. The rule laid down in *Kemp v. Pryor*(a) is, that the bill must state a case, which, if proved, would necessarily entitle the plaintiff to relief, or otherwise it is demurrable. According to the case made by the bill the trust ceased in 1746; but, if it did not, still, upon the allegation of the purchase in 1797, it clearly ceased in that year. Since that time there has been an adverse possession, and the only question remaining is, whether the adverse possession can be attributed to a concealed fraud, which could not with reasonable diligence have been discovered.

The case, with respect to fraud, raises some difficulty. Where a bill alleges a specific case as a ground for relief, and then charges that the defendant committed fraud, the court is bound to consider the general charge of fraud with reference to the particular allegations. For that there are many authorities. But where the bill contains only general charges of fraud, and does not explain in detail what the nature of the fraud is, there is more difficulty in applying a rule. Where there is a charge of

(a) 7 Ves. 237.

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fraud, and the defendant demurs, he admits the charge to be true, and the demurrer must be overruled; but, if the allegation is so vague that it is impossible to make out what the pleader means to represent, the court must treat such general charge as too indefinite and uncertain to be regarded.^(a) It cannot be [*502] presumed *that the parties who have held the property in succession since 1747 had actual notice of the fraud imputed to them, and the will does not specifically allege that any of them had such notice. The only way in which I am asked to infer notice on their parts is, from two allegations of the bill,—one, that they took advantage of the ignorance of Thomas May,—and the other, that, by fraudulent contrivances, he was kept in ignorance of his title and legal rights. If the bill had contained distinct allegations of notice, it might have been proper that operation should be given to the allegation of fraudulent contrivances. The statement, however, simply is, that the property has been enjoyed adversely since 1746,—nearly a century; and that it has been so by means of the fraudulent contrivance of four or five persons in succession, during that period: I cannot allow such a charge to have any effect. It is the case of a fishing bill, and I am only following the decided cases when I say, that these charges are too vague to sustain it.

Demurrer allowed.

(a) See cases of uncertainty of allegation:—*Metcalf v. Hervey*, 1 Ves. 248; *The East India Company v. Hanchman*, 1 Ves. jun. 287; *Cresset v. Mitton*, 1 Ves. jun. 449; *Ryves v. Ryves*, 3 Ves. 343; *The Mayor and Commonalty and Citizens of London v. Levy*, 8 Ves. 398; *Jones v. Jones*, 3 Mer. 161; *The Princess of Wales v. The Earl of Liverpool*, 1 Swans. 126; *McGregor v. The East India Company*, 2 Sim. 454; *Mendizabel v. Machado*, 1 Sim. 77; *Walburn v. Ingilby*, 1 Myl. & K. 61; *Hardman v. Ellamcs*, 5 Sim. 640; S. C., 2 Myl. & K. 732; *Stansbury v. Arkwright*, 6 Sim. 481; *Frietas v. Dos Santos*, 1 Young & J. 574.

1844.—*Overton v. Banister*.

***OVERTON v. BANISTER.**

[*503]

1844: May 3 and 8.

Payment by a trustee to an infant cestui que trust, nineteen years of age, on the false representation by herself and her parents, that she had attained the age of twenty-one, held to be a discharge to the trustee for the sum so paid; but a release executed by the infant to the trustee of all demands in respect of the trust, held not to be a bar to a suit by the same cestui que trust against the trustee, although such suit was not brought until seven years after the cestui que trust had attained twenty-one.

THE defendant John Banister, owing to the improper application of trust-funds by his brother James, who was a co-trustee with him, became liable to make good a sum of 600*l.*, 4*l.* per cent. stock, and interest, to the three children of James, who were infants at the time of the breach of trust.^(a) The son of James, who was the eldest of his three children, came of age in 1817, and the defendant John Banister thereupon satisfied his claim on the trust-funds, and was released in respect of that share. The other two children were named Mary Ann and Sarah: Mary Ann attained twenty-one in December, 1833, and Sarah, in July, 1836.

In November, 1832, a Mr. Cottle, a solicitor, applied to John Banister, by letter, stating that Mary Ann would attain twenty-one in the following month, and claiming thereupon a sum of about 480*l.* stock, as her share of the trust-funds. This letter was accompanied by a note written by James, her father, stating that Mary Ann would be of age in December, 1832. John Banister, upon this representation, after some correspondence, agreed to pay Mary Ann 225*l.*, the remainder to be accounted for by James, her father. This 225*l.* was accordingly paid, and Mary Ann executed an indenture of release, dated the 19th of February, 1833, reciting, that she had attained her age of twenty-one on the 13th of December, 1832, and thereupon became entitled to her third part of the trust-fund and accumulations; reciting also the said agreement that John Banister should pay 225*l.* and

(a) See *Overton v. Banister*, 4 Beav. 205.

1844.—Overton v. Banister.

be released, and James should account for the residue; [*504] and witnessing, *that, in consideration of such payment thereby acknowledged by the said Mary Ann, she thereby released and discharged John Banister from all claim or demand in respect of her share of the said trust funds, and the interest thereof. In August, 1834, an application was made to John Banister by the same solicitor, stating that Sarah had attained her age of twenty-one. John Banister having made some question of this fact, James and his wife, the father and mother of Sarah, made affidavits of the truth of it; and, upon receiving such affidavits, John Banister entered into the same arrangement concerning Sarah's share as he had made with regard to Mary Ann's,—paid her the sum of 225*l.*, and received a like release, executed by Sarah, dated the 18th of August, 1834. Neither the propriety of the payment, nor the validity of the release was questioned until several years after Mary Ann and Sarah attained their ages of twenty-one: James Banister, the father and co-trustee, was insolvent.

In October, 1840, Sarah married the plaintiff Overton. In May, 1841, Sarah and her husband, and Mary Ann, filed their bill against John and James Banister, stating the trust, admitting that the plaintiffs had received 225*l.* each on account thereof, suggesting that the defendant John Banister pretended that the plaintiffs had executed some deed or deeds, and charging that they were ignorant of the contents thereof, and ought not to be bound thereby. The bill prayed that an account might be taken of the trust-funds, and of the dividends and accumulations thereof, and that what should be found due to the plaintiffs on such account might be paid to them respectively by the said defendants. The answers admitted the facts as above stated. Cottle, the solicitor through whom the communications had taken place, had since died.

[*505] *Mr. *Kenyon Parker* and Mr. *Faber* submitted, that the decree was of course, unless the defendants, the trustees, could show that they had been discharged from their liability by some act of the cestui que trusts; and that an inden-

 1844.—*Overton v. Banister*.

ture executed by the plaintiffs during infancy could not be a bar to their claim.

Mr. Perry, for James Banister.

Mr. Romilly and *Mr. Shadwell*, for the defendant John Banister, argued, that the plaintiffs could not have joined in the transaction of 1832 and 1834, without being parties to the fraud committed upon their trustee; and that the court would not permit them now, on a technical ground, to disavow their acts: they had represented themselves to be of age by the recitals in their deeds, and the court would bind them by that representation. Lord Chancellor Cowper had gone farther than merely binding a party by deliberate acts which took place in his minority: he held, that, "if an infant was old enough and cunning enough to contrive and carry on a fraud, he ought, in a court of equity, to make satisfaction for it."^(a) And, in a later case, Lord Chancellor King decreed, that a defendant should either confirm a lease which he had made at seventeen years of age, or refund the fine, saying emphatically—"Infants have no privilege to cheat men."^(b) In *Cory v. Gertcken*,^(c) Sir Thomas Plumer held, that the fraudulent conduct of an infant affected persons claiming under him.

Mr. Kenyon Parker, in reply, said that the cases cited would have been authorities for the defendant if the bill "had sought to recover the monies which the plaintiffs [*506] had received during their infancy; but as the suit was only to recover the residue of the trust-funds, which there was no pretence had ever been paid, the cases referred to rather supported the case of the plaintiffs.

May 8th.—VICE-CHANCELLOR:—The plaintiffs in this case, giving credit for sums which have been received by them, are

(a) *Watts v. Cresswell*, 9 Vin. Abr., tit. "*Enfant*," N., pl. 24, p. 415, cited 9 Mod. 96; Sugden Vend. & Pur, Vol. 3, p. 428, ed. 10.

(b) *Evroy v. Nicholas*, 2 Eq. Ca. Ab. 488.

(c) 2 Madd. 40.

1844.—Overton v. Banister.

entitled to the decree for an account of what remains due to them in respect of their legacies. A case of more gross and deliberate fraud has never come under my observation. If the plaintiffs by their bill had asked payment over again of the 225*l.*, they certainly would have failed in obtaining such a decree: the cases cited at the bar would have been sufficient authority for rejecting that claim. I am inclined also to think, that, if the plaintiffs had obtained any other benefit whatever from the defendant John Banister, the court would not have given them relief in this suit except upon the terms of giving up what had been so obtained. But, as the case stands, John Banister was liable to them for the whole of their respective shares of the trust-fund and accumulations, and they have received no more than 225*l.* each. The question, therefore, is, whether the defence set up is an answer to a bill for an account of the remainder. The answer of John Banister relies on the release which was given for all demands. That would have been a bar at law if given by an adult, but the release of infants is worth nothing in law. The release, then, being void at law, the defendant cannot at the utmost do more than rely upon it as an agreement in equity; and the first question is, whether, if the releases had been executed [*507] after the plaintiffs had attained *twenty-one, such releases could have been admitted in equity as a bar to the suit. John Banister was liable for the whole of the shares of the plaintiffs in the trust-funds; and the agreement was, that, on payment of part of what was so due to them, the rest should be released. It has been decided in numerous cases at law, that payment of part of a debt, with an agreement simply to forbear the rest, is void, on account of the want of consideration: *Fitch v. Sutton*.(a) In this case I cannot say there was any consideration for the agreement at the time it was made; and, if the consideration is to be supposed to arise out of the delay which has since taken place, there are other circumstances, which, with reference to that point, must be taken into consideration.

John Banister, as trustee to the parties, was, in a sense, bound to inform them what their interests were in the trust-funds;

(a) 5 East, 230.

1844.—Overton v. Banister.

and, therefore, what their rights were as against the trustees. If Cottle could be shown to have acted for these parties as their solicitor, adversely to the defendant, I will not say the case might not have required a different consideration. It does not, however, appear in what situation Cottle stood with regard to the respective parties. The plaintiffs were infants at the time of the transaction, and the bill alleges that the release was not read over to them. Cottle is dead: his clerk, who was present as an attesting witness, has been examined, and the defendant has not sought to rebut the allegation of the bill, by asking him whether the release was read over, or not. I give entire credit to the statement of the defendant John Banister. Morally speaking, he is, no doubt, innocent. I look upon the whole transaction as the act of James. The result, however, as it appears to me, is, that this is *not an agreement which would be [*508] binding in equity, unless the subsequent delay was such as to raise a consideration to support it; but no such case has been suggested. James is represented by all parties as having been insolvent from the beginning. I think I cannot refuse, according to strict law, to decree an account of what is due to the plaintiffs in respect of the capital stock and dividends, inserting in the decree a direction to allow the defendant the two sums of 225*l.* which he has already paid to the plaintiffs. No costs to be given to the hearing, further directions and the subsequent costs being reserved.

HUDSON v. DUNGWORTH.

1844: Nov. 25th.

Order for leave to enter the service of a copy of the bill under the 24th Order of August, 1841, on the statement at the bar, that the draft, as settled by counsel, contained no prayer for account, payment, conveyance, or other direct relief against the defendant, without requiring an affidavit of that fact or explanation of the nature of the suit.

THE affidavit of service of a copy of the bill did not state that

 1844.—Hudson v. Dungworth.

no direct relief was thereby prayed against the defendant so served ; but

Mr. *W. T. S. Daniel*, moving to enter the memorandum under the Order XXIV of August, 1841, said, that the draft, as settled by him, prayed no such relief ; and he was instructed that the bill on the file was a copy of that draft : *Mawhood v. Labouchere.*(a)

Ordered.

The note to the case of *Welch v. Welch*, 1 Hare, 593, as qualified by *Broughton v. Broughton*, ante, 335, and the above case, appears to point out all the evidence which is required by the court on the motion for leave to enter the memorandum of service.

 [*509]

*KIRK v. EDDOWES.

1844: May 22nd ; June 6th and 7th.

The testator bequeathed a sum of 3000*l.* to his daughter for her separate use, for life, with remainder to her children as she should appoint ; and, in default of appointment, to her children equally, with provisions for survivorship, advancement, and for the substitution of their issue ; and subject to an annuity, and to his debts, he devised and bequeathed all the residue of his real and personal estate (naming securities for money) unto his son absolutely. After the date of the will, the testator gave to his daughter and her husband a promissory note for 500*l.* then due to the testator. In a suit by the children of the daughter against the son, claiming to have the legacy of 3000*l.* invested and secured for their benefit, the defendant tendered parol evidence that, after the date of the will, the testator was requested by his daughter to confer some benefit on her husband, and that, thereupon, the testator gave her the promissory note, declaring that it was to be in part satisfaction of the legacy of 3000*l.* ; and that the testator was advised by his solicitor, that it was not necessary to alter his will to give it that effect:—*Held*, that this evidence was admissible, as constituting an essential part of a transaction subsequent to, and independent of, the will, of which subsequent transaction there was no evidence in writing.

That the parol evidence was not received as evidence of revocation or alteration of any part of the will, but as evidence of a transaction, whereby the legatee had received part of her legacy by anticipation.

That the advance to the daughter and her husband was an ademption pro tanto of the legacy bequeathed by the will for the benefit of the daughter and her children.

 (a) 12 Sim. 362.

1844.—*Empringham v. Short*.

Whether, if the children had been all living at the date of the will, and been named therein individually, and not merely described as a class, the advance would have been an ademption, *quære*.

H. EDDOWES, by his will, dated in June, 1827, after directing that his debts, and funeral and testamentary expenses, should be paid by his executors, and bequeathing his household goods and furniture to his daughter, Elizabeth Kirk, gave, devised, and bequeathed all and every his messuages, cottages, closes, lands, tenements, hereditaments, and real estate, situate in the county of Leicester, or elsewhere; and also all and singular his monies, securities for money, stock in trade plate, wines, horses, books, book debts, sum and sums of money, and securities for money, which should be due and owing to him at the time of his decease; and also the fixtures in and about his dwelling-house, shop, and premises, and all other his personal estate and effects whatsoever, (not thereinbefore by him disposed of,) unto and to the use of his son John Henry Eddowes, his heirs, executors, administrators, and assigns; subject nevertheless to, and the testator thereby charged the same estates respectively with, the payment of the sum of 3000*l.*, and the annuity of 100*l.* thereafter bequeathed. And the testator gave and bequeathed unto his brother Storer Eddowes, for his *life an an- [*510] nuity of 100*l.*, to be yearly issuing out of the said real estate. And the testator thereby gave and bequeathed unto his son John Henry, and his brother Storer, their executors and administrators, the sum of 3000*l.*, to be paid into their hands at the expiration of twelve months next after his (the testator's decease, upon trust to invest the same, at interest, on government, real, or other good security; and stand possessed thereof, upon trust to pay, apply, and dispose of the interest, dividends, and produce thereof, from time to time, as the same should become due, unto his (the testator's) daughter Elizabeth Kirk, and her assigns, during her life, to and for her own sole and separate use and benefit; and, from and after her decease, upon trust for such one or more of the child and children of the said Elizabeth Kirk as she should, by deed or will duly executed, notwithstanding her coverture, direct or appoint; and, in default of such direction or appointment, in trust for all and every the child or children

1844.—Kirk v. Eddowes.

of his said daughter respectively, to be vested upon their attaining twenty-one; or to be sooner paid or applied for their preferment or advancement, as therein mentioned; and, in the meantime, to pay and apply the interest and produce thereof to and for the benefit of such child or children as therein mentioned, with a provision for survivorship among such children, and also a provision, in case any one or more of the said children should die under twenty-one, leaving lawful issue, that such issue should stand in the place of their parent, as therein mentioned; and, in case the testator's said daughter should die without leaving issue her surviving, or, leaving such, they should all die under twenty-one, without leaving issue as thereinbefore mentioned, then upon trust to pay and apply the said sum of 3000*l.*, and the interest due thereon, unto his son, the said John Henry

Eddowes, his executors, administrators, and assigns absolutely. And the testator appointed his *said son and brother his executors. The testator died in 1827. At the date of the will of the testator, his daughter Elizabeth had one child living: two other children of the daughter were born after the testator's death. The husband of the daughter died in 1833.

The bill was filed in 1842, by the three children of Elizabeth Kirk, against John Henry Eddowes, (Storer Eddowes being also a defendant, and certain assignees of his annuity and Elizabeth Kirk being made defendants by service of the copy of the bill upon them,) claiming the benefit of the legacy of 3000*l.*, (as a fund yet unappointed,) and praying that the same might be raised, secured, and applied according to the trusts of the will, and for a new trustee in the place of Storer Eddowes, who was insolvent.

The defendant John Henry Eddowes, by his answer, admitted assets of the testator to pay the entire legacy, and stated, that he had invested the sum of 2500*l.* upon the trusts expressed in the will, for the benefit of Elizabeth Kirk, and the plaintiffs, her children. The defendant stated, that, shortly after the date of the will, the testator gave Elizabeth Kirk a sum of 500*l.*, then due to him from one Warner, on his promissory note, by giving up such promissory note, and procuring Warner, in satisfaction

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thereof, to make and deliver to Elizabeth Kirk another promissory note for the like sum, which sum had since been received, either by Elizabeth Kirk or her deceased husband : that such gift was made under the following circumstances :—Shortly after the date of the will, the testator informed Elizabeth Kirk of the provision he had thereby made for herself, and her children, whereupon she expressed herself dissatisfied that the whole legacy had been tied up, saying, she “knew her [*512] husband was in debt; and the testator then said, that he had 500*l.* on Warner’s note, which he would give her on account of the legacy given her by his will : that the 3000*l.*, and the annuity to Storer Eddowes, was a full half of his property, and he wished them to be equal : that the defendant thereupon asked the testator whether it would not be necessary to alter his will, and the testator replied, that he would ask Mr. Cradock (his solicitor) whether that would be necessary : that the testator afterwards, and before he perfected the gift of the note, and with reference thereto, inquired of Mr. Cradock whether, if he gave Mr. Kirk 500*l.*, on account of the legacy, it would go in part payment thereof, and Mr. Cradock told the testator that it would, and the gift was completed on the faith of that assurance, *pro tanto* in satisfaction of, and substitution for, the legacy of 3000*l.*

By the evidence of Storer Eddowes it appeared, that a conversation, to the effect stated in the answer, took place in the latter part of July, or in the month of August, 1827, on an occasion when only the testator and the defendants (his brother (the witness,) and his son and daughter) were present, and that the note was thereupon given up to Warner, and a new note, for the same amount, made by Warner, payable to Mr. or Mrs. Kirk ; and Mr. Cradock deposed, that, in the latter end of July, or early in August, 1827, he attended the testator as his attorney, and was informed by him that he had given his daughter Warner’s note for 500*l.*, which sum it was his wish should go in part of the legacy given to her by his will ; and that, in answer to an inquiry by the testator, he (Cradock) informed him, that, if his intention that it should go as part of the legacy was clearly understood by all parties interested, it was not “necessary to alter his will ; and that the testator there- [*513]

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upon expressed his determination, in consequence of such advice, not to make any alteration in his will. At the hearing,

Mr. *Romilly* and Mr. *Rogers*, for the plaintiffs, claimed their legacy of 3000*l.*, under the will, and submitted, that the transfer by the testator to his daughter of one of the securities, which he held for a sum of money, although made after the date of his will, could not affect, or to any extent adeem, the legacy to the plaintiffs. The disposition of the two gifts was wholly different. A gift to A. could not adeem a previous legacy to B. The circumstances raised no presumption against the title of the plaintiffs to the entire legacy: and the conversations or declarations of the testator were not admissible in evidence. It was only to rebut a presumption of law, which arose upon the facts, or to fortify such a presumption, when evidence had been adduced on the other side to rebut it, that parol evidence was received.

Mr. *Walker* and Mr. *Willcock*, for the defendants, tendered the evidence of the conversation which took place between the testator and his son and daughter, and the solicitor of the testator, with respect to the delivery of the promissory note of Warner to Mrs. Kirk, and the declarations of the testator at that time,^(a) and submitted that the evidence was admissible, not as affecting the will, but as part of, and explaining, a subsequent transaction. The evidence, if received, clearly showed that the 500*l.* was advanced towards, and as part of, the daughter's portion. The circumstance that the portion was settled by the will upon the daughter and her family did not deprive it of the character of a portion;—it was the ordinary mode of dealing with a gift to a daughter. Her children took an interest only through her, and not independently of her; and an act which affected her right in the substance of the gift would, in the same measure, affect the derivative right of her children.

(a) P. 512.

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The cases mentioned in the judgment, and *Scotton v. Scotton*,(a) *Hale v. Acton*,(b) *Alleyn v. Alleyn*,(c) *Bellasis v. Uthwatt*,(d) *Shudal v. Jekyll*,(e) *Roome v. Roome*,(f) *Holmes v. Holmes*,(g) *Fremantle v. Bankes*,(h) *Osborne v. Duke of Leeds*,(i) *Trimmer v. Bayne*,(k) *Mackenzie v. Mackenzie*,(l) *Wharton v. Lord Durham*,(m) *Weall v. Rice*,(n) *Booker v. Allen*,(o) *Lloyd v. Harvey*,(p) and *Sheffield v. Earl of Coventry*,(q) were cited, and commented upon.

VICE-CHANCELLOR :—Henry Eddowes, the testator in the cause, by his will gave his real and personal estate to his son, the defendant John Henry Eddowes, absolutely charged with an annuity of 100*l.* to the testator's brother Storer Eddowes, *for his life, and with a capital sum of 3000*l.* to [*515] the defendant Mrs. Kirk, for her life, for her separate use, with remainder to such of her children as she should appoint; and, in default of appointment, amongst her children, to vest at twenty-one, with benefit of survivorship amongst them, in case of a child dying under twenty-one without issue, and substituting the issue of any child who should die under twenty-one, leaving issue, for such child. Such generally is the scope of the will. The plaintiffs who are children of Mrs. Kirk have filed their bill to recover the 3000*l.*

The right to 2500*l.*, part of the 3000*l.*, is admitted; but John Henry Eddowes contends, that the remaining 500*l.* has been adeemed by an advance to that amount, alleged to have been made by the testator after the date of his will. The defendant, admitting that the case of *Pym v. Lockyer*(r) will apply to the circumstances of this case, has not contended that the alleged advance was an ademption of more than 500*l.* of the legacy. Evidence in support of defendant's case was tendered by the

(a) 1 Str. 236.

(b) 2 Ch. Rep. 35.

(c) 2 Ves. 37.

(d) 1 Atk. 428.

(e) 2 Atk. 516.

(f) 3 Atk. 181.

(g) 1 Bro. C. C. 555.

(h) 5 Ves. 85.

(i) Id. 384.

(k) 7 Ves. 608.

(l) 2 Russ. 262.

(m) 5 Sim. 297; S. C., 3 Myl. & K. 472; S. C., 3 Cl. & Fin. 146.

(n) 2 Russ. & Myl. 251.

(o) Id. 270.

(p) Id. 310.

(q) Id. 317.

(r) 5 Myl. & Cr. 29.

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defendant, and in part objected to by the plaintiff; but, by consent of the plaintiff's counsel, the evidence was read *de bene esse*; and, if the evidence be admissible, I think it establishes, in accordance with the case made by the answer, that the testator did, at Mrs. Kirk's instance and request, give her husband 500*l.*, by giving him a note of one Warner for that sum; and that, at the time of doing so, he declared, that he gave it in part satisfaction of the share of his property given her by his will. This may be subject only to a question, whether the 500*l.* originally due upon Warner's note was ultimately paid.

[*516] * [His Honor read the evidence of the solicitor, of the declarations of the testator.]

The question in its legal bearings is, to some extent at least, free from doubt. The bequest by the will, separately considered, is clear. The gift of Warner's note, at a time subsequent to the will, is clear. The two gifts being separate and distinct, both *prima facie* will take effect. The gift of Warner's note, at all events, is to stand; and the question to be decided is, whether the gift by the will is adeemed, *pro tanto*, by the gift of Warner's note. For the sake of brevity, I will call the will the first, and the gift of Warner's note, the second transaction; although, in fact, the gift of Warner's note was perfected before the will came into operation. The way in which I have stated the question presents it for judgment in its most convenient form. No question is made as to the legal effect of the will, separately taken; nor is any question made that the second transaction, whatever it was, at all events is to stand. The questions I have to consider are two,—first, as to what the 'second transaction really was,—and secondly, as to the effect, if any, of the second transaction upon the first.

Where similar questions have arisen upon gifts given by two distinct instruments, the law as to the admissibility of parol evidence has, I believe, been long since settled. In such cases the rule of law applies, that written instruments cannot be added to, or explained by, parol evidence; and, therefore, unless the second instrument, in express terms, or by presumption of law, adeems

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the gift made by the instrument of earlier date, no question can arise. Both instruments will take effect. Again, if the second instrument in terms adeems the gift by the first, it could not, I apprehend, be contended *that it would not pro- [*517] duce its intended effect; a party claiming under, and having taken the benefit of it, could not claim that benefit, and at the same time refuse to give full effect to it. If, however, the second instrument do not, in terms, adeem the first, but the case is of that class in which, from the relation between the author of the instrument, and the party claiming under it, (as in the actual or assumed relation of parent and child,) or on other grounds, the law raises a presumption, that the second instrument was an ademption of the gift by the instrument of earlier date, evidence may be gone into to show that such presumption is not in accordance with the intention of the author of the gift; and, where evidence is admissible for that purpose, counter-evidence is also admissible. In such cases, the evidence is not admitted, on either side, for the purpose of proving, in the first instance; with what intent either writing was made; but for the purpose only of ascertaining whether the presumption which the law has raised be well or ill founded. For this it will be sufficient to refer to the case of *Hurst v. Beach*,(a) and the cases cited in the elaborate judgment of the Lord Chancellor of Ireland, in the late case of *Hall v. Hill*,(b) in which he fully considers the effect of acts *inter vivos* in adeeming legacies, *Hartopp v. Hartopp*,(c) *Powys v. Mansfield*,(d) and numerous other cases. In this case, the advance of 500*l.* was after the date of the will. This, the second transaction, however, is not evidenced by any writing; and the technical rule to which I have referred, against admitting evidence to prove what was the intention of the parties to that transaction, does not, therefore, apply. The question is, whether any other rule applies, which *shall ex- [*518] clude the evidence. In order fully to try this case, I will first suppose the 3000*l.* to have been given absolutely to Mrs. Kirk, for her separate use.

(a) 5 Madd. 351.

(c) 17 Ves. 192.

(b) 1 Dru. & War. 94.

(d) 3 Myl. & Cr. 359.

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The defendant's evidence was not objected to, nor could it have been successfully objected to, so far as it went to show the gift of Warner's note, its amount, and other circumstances attending it, with the exception of the testator's declarations accompanying the gift. For the court which has to decide whether the transaction has affected a partial ademption of the legacy must know what the transaction was; but the declarations of the testator, accompanying the transaction, were objected to. Why should those accompanying declarations not be admissible? They are of the essence of the transaction, and the truth of the transaction itself cannot be known to the court without them. The rule which would exclude the evidence, if the intention of the parties had been expressed in writing, does not apply. I assume, that, if the intention of the parties, as proved by the evidence, had been in writing, it could not be contended, on the part of Mrs. Kirk, to whom the legacy was given for her separate use absolutely, that a payment to her husband of the amount of her legacy, at her instance and at her request, would not have precluded her from claiming it under her father's will; or, in other words, that the advance made under such circumstances would not have adeemed the legacy. If that be not so, the argument must be, that an advance made by a testator to one of his legatees, under an agreement in writing, that the legatee shall accept the advance in full satisfaction of his legacy, would leave the legatee at liberty to claim the legacy, notwithstanding the agreement; and, if such an argument be not admissible, the declarations of the testator must be admissible in the

[*519] *case I am now supposing, unless there be some rule of law which hinders a transaction, like that which the defendant relies upon, from being valid unless it be evidenced by writing. This, however, cannot be successfully contended for. The evidence does not touch the will; it proves only that a given transaction took place after the will was made, and proves what that transaction was, and calls upon the court to decide whether the legacy given by the will is not thereby adeemed. Ademption of the legacy, and not revocation of the will, is the consequence for which the defendant contends; a distinction which is marked by Lord Hardwicke in the case of *Rosewell v. Ben-*

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nett.(a) The defendant does not say the will is revoked ; he says the legatee has received his legacy by anticipation.

In principle, therefore, I cannot see my way to reject the evidence in question.

How, then, does the case stand upon authority ? The cases of *Monck v. Lord Monck*,(b) *Rosewell v. Bennett*,(a) *Thellusson v. Woodford*,(c) *Bell v. Coleman*,(d) *Biggleston v. Grubb*,(e) *Hoskins v. Hoskins*,(f) *Chapman v. Salt*,(g) *Powel v. Cleaver*,(h) *Grave v. Lord Salisbury*,(i) *Ex parte Dubost*,(k) and *Shudal v. Jekyll*,(l) are all authorities in favor of admitting the evidence. In *Hall v. Hill*, the Lord Chancellor of Ireland refers,(m) with marked approbation to the cases of *Rosewell v. Bennett*, *Biggleston v. Grubb*, and *Monck v. Lord Monck*, upon this point. I am aware that an argument may be raised, as *to how far the admission of the evidence, in the cases [*520] I have cited, or the greater part of them, may be referred to the principle to which I have before adverted—that of applying it to a presumption first raised by the court. Such an argument, however, will be found, upon examination, not to be sustainable ; for if the law would, in those cases, have raised the presumption, the evidence which was objected to was unnecessary,—there being no evidence to countervail the presumption. But the evidence, though objected to in some of the cases, was received, and, therefore, must have been read to prove what the transaction was. And it is remarkable that, in *Thellusson v. Woodford*, although the exception to the Master's report raised the question whether the evidence was admissible, the eminent counsel who argued against the ademption barely threw out a question, whether the evidence was admissible, without arguing against its admissibility ; and Sir John Leach said, “ This is not a case of implication, but of express declaration.”

Admitting, therefore, in the fullest manner, that parol evidence

(a) 3 Atk. 77.

(b) 1 Ba. & Bea. 298.

(c) 4 Madd. 420.

(d) 5 Madd. 22.

(e) 2 Atk. 48.

(f) Prec. Chan. 263.

(g) 2 Vern. 646.

(h) 2 Bro. C. C. 499.

(i) 1 Bro. C. C. 425 ; 18 Ves. 152.

(k) 18 Ves. 140.

(l) 2 Atk. 516.

(m) 1 Dru. & War 18.

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is inadmissible to prove that a will or other written instrument was intended to have an effect not expressed in it, still, with the opinion of the Lord Chancellor of Ireland, so recently expressed upon that point, and the other authorities I have referred to, supporting the opinion which I individually entertain, that the evidence is admissible, I shall receive it.

The subject has been very elaborately considered by Mr. Roper.^(a) I cannot but think the learned writer has not sufficiently kept in mind the distinction between ademption and [*521] revocation, nor between the cases in which the intention of the parties has been reduced into writing, and those in which the court has had to ascertain, by parol evidence only, what the parties had done. It was said that there was a distinction in this case, inasmuch as the advance was made, not, as in the cases cited, to the legatee herself, but to the husband of the legatee. That circumstance might be material upon the question of implied ademption, but it cannot affect the question of admitting or rejecting the evidence to prove what the transaction was. In more than one of the cases cited the same circumstance occurred.

In the preceding observations I have supposed the 3000*l.* to have been given to Mrs. Kirk absolutely: it was, in fact, given to her for life, for her separate use, with remainder to her children, as a class; and it remains to be seen whether that circumstance alters the case. My opinion is, that it makes no difference. I do not mean to decide that a legacy to A. can be adeemed by a mere advance to another person than A. That might be simple revocation and not ademption. Nor do I mean to decide, that, if in this case the bequest had been to Mrs. Kirk for life, with remainder to children living at the time, and named in the will, the bequest to the children could have been affected by the advance in question. I give no opinion upon that case. But here I find a legacy to Mrs. Kirk, for her separate use, with remainder to her children as a class: that I think is in the nature of a portion to the daughter herself. It is, in fact, a common way of dealing with a lady's portion upon the occasion of

(a) Tr. on Legacies, Vol. 1., p. 341 et seq.

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her marriage. A provision for herself, and her children after her, is the use of her portion. I find her, in effect, requesting her father to advance part of her fortune to her husband, and he does so, declaring at the time what his testamentary dispositions are, as between his son and daughter, and what *his intentions are in making the advance; and the 500*l.* [*522] is accepted upon that basis. *Carver v. Bowles*(a) is an authority in favor of this view of the case, as are many of Lord Eldon's observations in *Trimmer v. Bayne*,(b) which is rather the converse of the present case.

Upon the whole, not holding that extrinsic evidence can, in any case, be admitted to alter, add to, or vary a written instrument, or to prove with what intention an instrument was executed,—nor that declarations of the testator, made at any other time than contemporaneously with the advance, and as part of the transaction the truth of which I am bound to ascertain, would, in this case, be admissible,—and distinguishing between revocation and ademption,—I am of opinion that this evidence must be received.

DECLARE that the legacy of 3000*l.* was adeemed, to the extent of 500*l.*, by the gift of the promissory note to Elizabeth Kirk.(c) Let a new trustee be appointed in the place of Storer Eddowes. Refer it to the Master to inquire on what securities the legacy of 2500*l.* is now invested. Liberty to state special circumstances. Reserve further directions and costs.

(a) 2 Russ. & Myl. 301.

(b) 7 Ves. 508.

(c) The plaintiffs raised no question as to the fact of the 500*l.* secured by the note having been realized. See p. 515.

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[*523]

*DRAKE v. DRAKE.

1844: March 6th and 7th, and May 22nd and 24th.

An agreement in writing for the sale of an estate by a father to his son expressed a money consideration; but the conveyance of the estate expressed the consideration of natural love and affection. To a bill by the son for a discovery of the conveyance, a plea of the agreement in writing, and that the purchase-money had never been paid or released, was held, under the circumstances to be defective, in not averring that the money was due.

Bill of discovery in aid of an action of ejectment. Plea, that the plaintiff had contracted to purchase the estate, and that the defendant had a lien on it for the unpaid purchase-money. *Seemle*, that the plea is no defence to the discovery; but that the proper mode of protecting the equitable interest of the defendant is by a cross-suit for relief.

A BILL of discovery.—The bill alleged, that certain indentures of lease and release, dated the 1st and 2nd of July, 1826, were made and executed between and by W. Drake the elder, of the first part, and John Drake, the defendant, W. Drake the younger, F. Drake, S. H. Drake, and the plaintiff, Edwin Drake, of the second part; reciting, (as the fact was,) that W. Drake the elder, by certain agreements in writing, dated the 20th of June, 1835, contracted with the parties of the second part for the sale and conveyance to them, respectively, of the therein-comprised messuages and hereditaments, and that the said parties of the second part were in possession of such premises respectively, under the said contract; and that it is by the said indenture of release witnessed, that, in pursuance of the said contract, and in consideration of the natural love and affection which W. Drake the elder had and bore for his sons, the parties of the second part, he the said W. Drake the elder thereby granted and released the hereditaments, therein respectively mentioned, to the use of the said parties of the second part respectively, and their respective heirs and assigns, for ever. That the defendant John Drake had obtained possession of the messuages and premises so contracted to be sold to the plaintiff, and also of the said indentures of lease and release; and that he continued in possession thereof; and that the plaintiff was entitled, by virtue of the said indenture of release, to the same messuages and premises, for an

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estate of inheritance in fee-simple in possession. That the plaintiff had lately commenced an action of ejectment against the defendant for the recovery of the said hereditaments, but was not able to go to trial in the said action without the discovery *of the said indentures of lease and release ; and the bill [*524] prayed a discovery of the same, and of the matters therein mentioned accordingly.

The defendant put in his plea and answer ; and, as to so much of the bill as sought discovery of the indentures of lease and release, and of the contents thereof, he, by his plea, averred, that the said W. Drake the elder, on the 20th of June, 1835, contracted with the plaintiff for the absolute sale to him of the said hereditaments, for the price or sum of 180*l.*, and that a memorandum of such agreement was signed by the plaintiff ; that the plaintiff never paid, or tendered, or offered to pay to W. Drake the elder the said purchase-money ; and that W. Drake the elder continued in possession of the said hereditaments until his death : that W. Drake the elder died in March, 1839, having given, devised, and bequeathed all his real and personal estate to the defendant, his heirs, executors, &c., absolutely, (subject as therein mentioned,) and having appointed the defendant his sole executor, who had duly proved the said will ; and the plea averred, that the testator did not, in his lifetime, promise or agree to release ; and that the defendant had never released, or promised or agreed to release the plaintiff from the payment of the said sum, or any part thereof.

Mr. *Cooper* and Mr. *Selwyn*, for the plea, submitted, that the court would protect the equitable right of the defendant to hold the estate until the purchase-money was paid, and would not, therefore, compel a discovery, which would enable the plaintiff to succeed in the ejectment : *Dryden v. Frost*,^(a) *Browne v. Lockhart*,^(b) **Leman v. Whitley*,^(c) *Wallwyn* [*525] *v. Lee*,^(d) *Hoare v. Parker*,^(e) *Hare on Discovery*, Part II., c. 3, s. 3, p. 98.

(a) 3 Myl. & Cr. 670.

(b) 10 Sim. 421.

(c) 4 Russ. 423.

(d) 9 Ves. 24.

(e) 1 Bro. C. C. 578

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Mr. *Romilly* and Mr. *Barratt*, for the bill, said, the object of the plea was to exclude the plaintiff from his legal remedy, without tendering him an equitable one.

VICE-CHANCELLOR :—Two questions arise in this case ; one, whether the matter of the plea is sufficient as a plea in bar ; the other, whether, supposing it be sufficient, it is pleaded with sufficient averments.

On the first question,—the sufficiency of the matter of the plea, I have felt much difficulty. This is a mere bill of discovery in aid of an ejectment. To this discovery the defendant pleads facts which do not raise that single issue which is necessary to constitute a valid plea, unless they are to be understood as resolving themselves into this single issue, that the purchase-money is still due. Giving the defendant the benefit of this construction of his plea, but without admitting that he is entitled to it,—is that a reason why he should not answer the bill ? I do not deny that the allegation, if true, may entitle the plaintiff to relief in equity ; my doubt is, whether a bill in equity to enforce his lien, instead of this plea to the discovery, is not his proper course. The allegation, if true, is not at law a bar to the action ; and if the plaintiff is entitled to the relief he seeks at law, he is *prima facie* entitled to discovery also. If the plaintiff [*526] is entitled to recover at law, his right to *discovery is, *prima facie*, incident to his right to the relief ; and the defendant can no more refuse to give discovery in such a case than he could refuse to answer a bill for relief in this court, where the right to the relief in equity could not be controverted. Then, does the fact that the money is due constitute an equitable defence to the action at law ? The inclination of my opinion is, that the plaintiff can have the benefit of that fact only upon a bill filed by himself, claiming the benefit of his lien for the purchase-money said to be due. The allowance of the plea would decide nothing between these parties. The effect of allowing the plea would be to compel the plaintiff, either to pay the money, whether it is *bona fide* due or not, or to file his bill to have the conveyance delivered up. On such a bill I should not have means of imposing any terms upon the defendant with

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respect to the action, or the possession of the property. A decree in the plaintiff's favor in such a suit would not enable me to relieve the plaintiff from the necessity of again bringing his ejectment. I could make no decree concluding the question between the parties; nor would the effect of allowing the plea be to give the defendant the benefit of his lien, but it would or might give him the benefit of an equitable defence to the ejectment without paying the price the court ought to put upon it—that of his submitting on his part to do equity to the plaintiff. But if the defendant, instead of filing this plea to the discovery, had filed a bill to enforce his lien upon the estate in respect of the 1807., and had obtained the common injunction to restrain the proceedings in ejectment, I might, in giving him his lien, have imposed upon him the terms of giving judgment in the ejectment, and dealing with the conveyance as the court might direct. In such a suit, the matter in contest between the parties might be finally disposed of, which in this suit it cannot be. Attending to the *very special and limited interest which the defend- [*527] dant has in the property sought to be removed in the ejectment, and to the merely temporary consequence of allowing the plea, I cannot think the defendant has taken the right course. I cannot think that such a plea would have been good to a bill by the plaintiff to recover possession of the deed, although the court might have made the payment of what was due a condition of the decree the plaintiff asked. That case and the present are in principle alike. In a word, (for to this at last it comes,) the defendant's only defence to the action is his lien, and that lien he can only enforce by bill. If he does not choose to resort to that mode of defence, he has none.

But the second question decides me to overrule the plea. The case made by the bill is simply this: that a conveyance was made and executed which recited certain agreements in writing for the sale and conveyance, by the father to his sons respectively, of parts of his property; and that the father had conveyed the same accordingly. But the father is made to convey parcels of his estate to each of his sons, of whom the plaintiff is one, in consideration of natural love and affection, and as an advancement; and the bill prays discovery in aid of an ejectment by

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the plaintiff to recover his portion of the estate. In answer to this bill I find a plea, which, admitting the conveyance as above set forth, does not aver that the purchase-money mentioned in the plea was due at the father's death, or at the time of plea pleaded, or at any time ; but avers only, that the purchase-money, so contracted to be paid by the plaintiff, had not been paid, or tendered, or offered to be paid or released, or promised or agreed to be released. I must, undoubtedly, take these averments to be true, upon the argument of the plea ; but the question irresistibly suggests itself,—why this argumentative mode of averring the existence *of a debt, if that is the meaning of the plea, instead of the short and usual mode of pleading a debt? The averment in the plea of the agreement to pay may well be satisfied by the existence of the paper which contains the agreement, without any debt having really been contracted, or the money ever due. The temporary purposes for which estates are sometimes split in this manner suggests an obvious explanation of the transaction, without supposing that a debt was ever contracted, or intended to be contracted between the plaintiff and his father.

I shall overrule the plea, but give the defendant leave to amend his plea, by introducing, if he thinks fit, the averment which, as I have stated, appears to me material.

I do not, of course, mean to intimate any opinion in the plaintiff's favor, upon the general merits of the question between the parties ; but I think the court is bound to see that the real case is brought before it, which I am satisfied is not the case upon these pleadings.

Plea overruled.

 1844 :—22nd and 25th May.

Pending an appeal by the defendant, from an order overruling a plea to discovery, a motion to stay the proceedings for compelling the defendant to put in his answer was refused, on the ground, that the court saw no doubt as to the question which was the subject of appeal ; and that no injury would result to the defendant from giving the discovery.

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The defendant presented his petition of re-hearing before the Lord Chancellor; and

Mr. *Selwyn*, for the defendant, moved for a stay of proceedings in enforcing the answer and discovery, pending the appeal. The effect of compelling the defendant to answer would be, that the plaintiff would *either get possession of the [*529] deed of conveyance, or obtain such information concerning it as would enable him to give secondary evidence of its contents on the trial of the ejectment; which would render it wholly useless to prosecute the appeal: *Wood v. Milner.*(a)

Mr. *Romilly* opposed the motion.

VICE-CHANCELLOR:—If the case of *Wood v. Milner* be an authority for the proposition that, whenever an order, overruling a plea or demurrer to discovery, is appealed from, the motion to stay the plaintiff's proceedings to enforce an answer, pending the appeal, is a motion of course, I have nothing to do, in the present case, but to make the order which the defendant asks. But I am satisfied that case is no authority for any such proposition. In this, as in similar applications, the discretion of the court is appealed to. In exercising that discretion, it is scarcely possible for the court to be pressed with a stronger argument than that which applies to cases like the present: namely, that, if the plaintiff be allowed to enforce an answer, pending the appeal, he has, in effect, the power to deprive the defendant of his appeal. But, on the other hand, the plaintiff is exposed to inconveniences of no inconsiderable magnitude, if the suit is to be tied up at the defendant's mere will and pleasure. The court, in such cases, must consider to what extent the defendant will really be prejudiced by giving the discovery sought by the bill, and how far, upon the merits, the appeal is likely to succeed,—always attending to this, that the defendant may apply to have his appeal advanced, and that the onus of making such an application is more properly thrown upon the *defendant, [*530]

(a) 1 J. & W. 636.

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than upon the plaintiff. In some cases it may be of the last importance to a defendant not to give the discovery sought by the bill; in others it may be wholly unimportant, so far as the discovery is concerned, whether a plea or demurrer is allowed or not. A plea or demurrer for want of parties, (for example,) or other plea of a dilatory nature, may admit the right to discovery; and an appeal from an order overruling a plea or demurrer, in such a case, would not necessarily be a ground for staying the plaintiff's process, pending the appeal. In this case the defendant does not deny the plaintiff's right to a discovery absolutely,—on the contrary, he admits the right, provided he will first pay for the estate. The discovery is not of matter which, on its own account, the defendant desires to withhold; and the discovery, if given before the money is paid, will not, in this court, prejudice the defendant's lien, if he have one. The extent of the injury to the defendant will be, that he may be compelled to enforce his lien by bill in this court, without which, indeed, he never can enforce it. The discovery itself is not a mischief against which the defendant seeks to protect himself by his plea; and the ultimate consequences of giving the discovery resolve themselves into a little extra trouble, if my judgment be wrong.

With respect to the merits, as far as my recollection goes of the grounds upon which I overruled the plea,—those grounds were two; one of which was, that, if the defendant had the lien he claims, his proper course was to file a bill to enforce it; that lien being his only defence in the action, and that defence being only available by bill. But I did not rest my judgment upon that alone, nor did I mean to lay down any general rule upon a subject where circumstances, apparently small, may make a great difference. The ground upon which I finally overruled [531] the plea, was the absence of any averment by the defendant, that the money claimed was at the time of the plea pleaded, or ever, due. Such an averment is so much a matter of course, in a case like this, that I could not but be struck with the omission,—an omission which I think was not supplied by the argumentative averment to which I was referred by counsel, as containing equivalent language. The averment that

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1844.—Drake v. Drake.

there had been a contract or agreement may be satisfied, in the conscience of the defendant, by the existence of the so-called contract or agreement in writing, whether that was, or was not, founded on a *bona fide* contract or agreement for sale, whereby, according to the truth of the case and the understanding of the parties, the plaintiff became liable to pay the purchase-money. And this defect in the plea, instead of being cured by the averment, that the money had not been paid, or tendered, or offered, to be paid, and that there had been no release, or promise or agreement to release, the plaintiff from the payment, was, in my opinion, made more prominent by that elaborate form of allegation, which showed that the pleader was aware of the importance of the averment, and that he studiously endeavored to evade the point. I may add, that I offered the defendant leave to amend his plea on this point, and his declining to do so satisfies me I have done no injustice by applying the strictest rules of pleading to this plea, and that the real case is not before me upon these pleadings. Indeed, it is scarcely possible for any one to look at the statements with respect to the deed in question, without seeing that the case is one which ought to be tried by the strictest rules of pleading. But it was upon the absence of the material averment to which I allude, and not upon any suspicion I might entertain of the cause of that omission, that I founded myself. I shall be greatly surprised if the defendant should persuade any judge in chancery to allow this plea, at least until it shall contain a distinct averment of the existence of the debt, the *existence of which the defendant surmises, [*532] but does not assert; and, even if that were added, I strongly incline to think the plea is bad on other grounds. There is nothing, therefore, in the merits to make the case an exception to the general rule.

I think it right, however, to give the defendant an opportunity of applying to the Lord Chancellor,—which he may do in the alternative, either to stay the proceedings until the appeal shall be heard in the regular course, or to advance the appeal. The plaintiff undertaking not to execute the attachment for three weeks, let the motion be refused with costs.

1844.—Hall v. Palmer.

HALL v. PALMER.

1844: 7th and 8th May.

The testator sealed and delivered a bond, conditioned for the payment of an annuity, after his death, to a woman with whom he had cohabited. At the time he gave instructions to prepare the bond, he stated, that it was not his intention to break off his connexion with the obligee; and he deposited the bond with his solicitors, with whom it remained until after the death of the obligor. On a reference to the master, he found that the consideration of the bond was past cohabitation:—*Held*, that the bond was valid; that, being proved to have been sealed and delivered, the retention of it in the hands of the obligor's solicitor did not affect its operation; and that, after the facts had been referred to the master, and the court was satisfied with his finding, payment of the sum secured by the bond would be decreed, without a trial at law.

JOHN VIDLER executed his bond, dated the 29th of June, 1824, whereby he became bound to the plaintiff Mary Hall, in the penal sum of 3000*l.*, conditioned for the payment to her of an annuity of 104*l.* during her life, to commence from the death of the obligor. The obligor had, at the time of the execution of the bond, cohabited for many years with the obligee, who had three children by him then living. The bond was prepared by the solicitor of the obligor, from his instructions, the testator at the same time stating, in answer to a question put by his solicitor to the effect, that he still cohabited with Mary Hall, and that it was not his intention to break off the connexion; and [*533] the evidence went to show *that the connexion had continued. The bond remained in the possession of the solicitors who prepared it, until after the death of John Vidler, the obligor, in January, 1827. After his death, Edward Parratt, his son-in-law, one of the executors appointed by his will, and who alone proved the will, paid or provided for the payment of all the debts of the testator, (except the annuity of Mary Hall;) and the remainder of the personal estate, not specifically bequeathed, being insufficient to pay all the legacies given by the will, the said executor made up the same out of his own moneys, and invested 20,000*l.*, New 4 per cent. stock, in the names of trustees, for Louisa, the daughter of the testator, to whom that sum had been bequeathed by his will: the executor also invest-

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ed other sums of 2000*l.*, 1000*l.*, and 5000*l.*, like stock, and 10,000*l.* consols, in trust for other legatees under the same will: the executor also paid the annuity secured to Mary Hall by the bond, until the year 1835, when he became insolvent. The testator's daughter Louisa became of unsound mind, and the 20,000*l.* stock was transferred into court, in the matter of the lunacy. The plaintiff filed her bill in 1839, as a bond-creditor of the testator, against the executor, and against the trustees and parties beneficially interested in the said several legacies or sums of stock, for payment of the arrears of the annuity by the executor, or rateably out of the said trust-funds, as part of the testator's estate. At the hearing of the cause, it was referred to the master to inquire of the execution and consideration of the bond, and the manner in which it had been dealt with; whether the estate of the testator had been, in any manner, released from the annuity; whether anything was due from the executor in respect thereof; and what sums then represented the said respective bequests of 20,000*l.*, 10,000*l.*, 2000*l.*, 1000*l.*, and 5000*l.*, stock.

*The master, by his report, found, that the testator [*534] duly sealed and delivered the said bond; and that the consideration thereof was the past cohabitation of the testator with the plaintiff, and her being the mother, by him, of three children; and that the said bond was prepared by the solicitors of the testator, and was allowed to remain with them, for safe custody, until the death of the testator: that the bond was, at that time, mislaid, but was subsequently found, and delivered to the plaintiff, in 1835: that the plaintiff had not, in any manner, released or exonerated the testator's estate from the payment of the annuity, and that the arrears therein mentioned were then due in respect thereof. The master also found, that no part of the testator's personal estate remained in the hands of, or was due from, the defendant Edward Parratt, applicable to the payment thereof; and he found, that the sums, thereafter mentioned, (a) represented the said bequests, and were held upon the trusts thereafter stated.

(a) Referred to in the decree, p. 538, *infra*.

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The defendants, the legatees, excepted to the report, for that the master should have found, that the consideration of the bond was the future, as well as the past, cohabitation ; and that the bond was deposited with the solicitors of the testator, by his directions, and amongst his own papers, and was never delivered up to the plaintiff, or any one on her behalf, and that nothing remained due thereon.

Mr. *Cooper* and Mr. *W. Hislop Clarke*, in support of the exceptions, argued, that the evidence showed, that the testator, at the time of executing the bond, had no [*535] intention of terminating his connexion with the plaintiff, which fact, together with the retention of the instrument under his own control, supported the presumption, that the future cohabitation was, not less than the past, part of the consideration ; and, if that were so, the security was void. The bond, moreover, was placed in the hands of the solicitors of the testator, and thus retained in his own control, without, so far as it appeared, any communication with the plaintiff on the subject : the plaintiff, therefore, had never acquired any legal right to the benefit of the instrument ; the testator might at any time have cancelled it. The question of the validity of the bond, as a legal debt, was one which would be more properly tried and determined at law, and the court, therefore, would not conclude the question without sending it to a court of law.

Mr. *Romilly* and Mr. *Elderton*, for the plaintiffs, denied that there was any inference from the evidence, that future cohabitation formed a part of the consideration : it was rather the contrary. The mere circumstances that the cohabitation had not then ceased, would not invalidate the bond. The bond had been sealed and delivered in due form of law, and the place of its deposit was immaterial ; but the finding of the master was, that, in this case, it had been chosen for safe custody ; it was, therefore, in the hands of the testator's solicitor, or not in that character, but as agent or trustee for the plaintiff.

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The cases referred to were, *Spicer v. Hayward*,^(a) *Cray v. Rooke*,^(b) *Marchioness of Annandale v. Harris*,^(c) *Turner v. Vaughan*,^(d) *Lloyd v. Carter*,^(e) *Friend v. *Har-* [*536]
rison,^(f) *Gray v. Mathias*,^(g) *Batty v. Chester*,^(h) *Binnington v. Wallis*,⁽ⁱ⁾ *Sear v. Ashwell*,^(k) *Exton v. Scott*,^(l) and *Dillon Coppin*;^(m) also Sheppard's Touchstone pp. 57, 58.

The VICE-CHANCELLOR said, that if, at the hearing, the parties had asked, that the question might be tried by a jury, the court would probably have been willing that the question should be decided in an action at law. Instead of taking that course, the parties had submitted to a decree which referred to the master every question of fact which was material to the validity of the bond. Although the court would commonly send a legal question to a jury, yet it had perfect jurisdiction to decide, both upon the fact and the law; and, after the parties had consented to submit to its decision, the court ought not to send the case to law, unless the result of the investigation in this court left some ground for doubt. It was true that a bond given in consideration, either in the whole or in part, of future cohabitation, was void; or, stating the rule in other words, if the security was of such a nature as to hold out an inducement, or constitute to either party a motive, to continue the connexion, the instrument would be void. Upon the evidence, he concluded that the bond was made in performance of what the testator was informed he was under a moral obligation to do, and that the suggestion of *turpis contractus* was not sustained. The *onus* was upon those who disputed the validity of the bond to prove that the consideration was bad. He could not distinguish this case from that of the bond *which, in *Gray v. Mathias*(*n*) was held to [*537] be valid. In that case as in this, the intercourse between the obligor and obligee did in fact continue. In the present case, it appeared upon the evidence, that, although the bond was

(a) Prec. Chan. 114.

(b) Cas. temp. Talb, 153.

(c) 2 P. Wms. 432; S. C., 1 Bro. P. C. (Toml. ed. 250.)

(d) 2 Wils. 339.

(e) 2 Atk. 84.

(f) 2 Car. & P. 584.

(g) 5 Ves. 286.

(h) 5 Beav. 103.

(i) 4 B. & A. 650.

(k) 3 Swans. 411, n.

(l) 6 Sim. 31.

(m) 4 Myl. & Cr. 647.

(n) 5 Ves. 286.

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given in consideration of past cohabitation, yet the obligor at the same time stated he had no intention of breaking off the connexion. The reasonable construction of that language was, that he meant to maintain the woman in a manner not unlawful. He did not think there was any doubt of the validity of the bond, in that respect, which required the decision of a court of law. The master had found that the bond was duly sealed and delivered; and that execution and delivery made the instrument effectual at law; and the only remaining question was, whether the fact, that it remained in the possession of the solicitors, of the obligor, would prevent its operation. Where an instrument, though apparently well executed, remained in possession of its author,—the grantor or settlor, and there was no evidence of the actual sealing or delivery, there might be a question as to its effect; but the sealing and delivery in this case were proved, and the case was therefore reduced to the simple question, whether the retaining of the bond in the possession of the obligor or his agents made it void at law or not. This point was settled in the cases of *Doe d. Garnons v. Knight*,^(a) and *Erton v. Scott*,^(b) in which it was decided, that, when once the instrument was sealed and delivered, the obligation was complete, and that the keeping of the instrument in the possession of the grantor did not render it inoperative. The exceptions, therefore, must be overruled.

THIS court doth declare that the plaintiff &c. is entitled to be paid the sum of 598*l.*, reported due in respect of the annuity to the late plaintiff Mary Hall, in &c. And this court doth declare, that the 19,826*l.* 16*s.* New 3 1-2 per cent. Annuities, standing &c, in trust, "In the matter of Louisa Cay, a person of unsound mind," and which represents the trust legacy of 20,000*l.* New 4 per cent. Annuities, in &c., and that the 9900*l.* Bank 3 per cent. Annuities, 7920*l.* New 3 1-2 per cent. Annuities, now respectively standing in the names of the defendants W. H. Palmer and E. Backhouse, upon the trusts by the will and codicil of the said testator, declared of the several legacies of 10,000*l.* Consols, 2000*l.* New 4 per cent. Annuities, and 5000*l.* and 1000*l.* like annuities, and which represent the said trust legacies of 10,000*l.* Consols, 2000*l.* New 4 per cent. Annuities, and 5000*l.* and 1000*l.* like annuities, are respectively liable to pay such a proportion of the said sum of 598*l.* as the said 20,000*l.* New 4 per cent. Annuities, 10,000*l.* Consols, 2000*l.* New 4 per cent. Annuities, 5000*l.* and 1000*l.* like annuities,

(a) 5 B. & C. 671.

(b) 6 Sim. 31.

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respectively bore to the whole amount of legacies given by the said testator's will. And it is ordered, that it be referred &c., to ascertain (having regard to the aforesaid declaration) what portion of the said sum of 598*l.* is payable out of the said 19,826*l.* 16*s.* New 3 1-2 per cent. Annuities, 9900*l.* Bank 3 per cent Annuities, and 7920*l.* New 3 1-2 per cent. Annuities respectively. And it is ordered, that the said defendants, W. H. Palmer and E. Backhouse do sell so much of the said 9900*l.* Bank 3 per cent. Annuities respectively, and pay the same to the said plaintiff. [Reference to tax all parties their costs of these suits,—the costs of the defendants as between solicitor and client,—the costs of the exceptants to include their costs of the exceptions, and the plaintiff's costs thereof paid by them.] And this court doth declare, that the costs of the plaintiffs and of the said defendant, Edward Parratt, of these suits, are payable out of the said [19,826*l.* 16*s.*, 9900*l.*, and 7920*l.* Stock,] rateably and in proportion to their respective amounts; and that the costs of the defendant W. H. Palmer, are payable out of the said [19,826*l.* 16*s.*, 9900*l.* and 7920*l.* Stock,] and that the costs of the defendants, C. P. Cay, and Louisa his wife, and Francis Vidler, are payable out of the said [19,826*l.* 16*s.* Stock;] the costs of the defendants, R. B. Cay, and Frances his wife, [and their children,] and E. Backhouse, out of the said [9900*l.* and 7920*l.* Stock,] or either of them; and the said Master is to apportion what shall be taxed for all such costs in accordance with the aforesaid declarations. And it is ordered, that the said defendants, W. H. Palmer and E. Backhouse, do sell so much of the said [9900*l.* and 7920*l.* Stock,] respectively, as will be sufficient to raise the amount apportioned to be paid out of the said [9900*l.* and 7920*l.* Stock,] respectively, and pay the same accordingly. And it is ordered, that the plaintiff do apply in the matter of the said Louisa Cay, a person of unsound mind, for payment out of the said 19,826*l.* 16*s.* New 3 1-2 per cent. Annuities, standing &c., in trust in the said matter, for payment of such portion of the said sum of 598*l.* and of the costs of these suits, as the said Master shall certify to be payable out of the said 19,826*l.* 16*s.* New 3 1-2 per cent. Annuities. Liberty to apply.

*COURTENAY v. WILLIAMS.

[*539]

1844: June 27; July 10 and 20.

In a suit by a legatee to obtain payment of the legacy out of the assets of the testator in a due course of administration:—*Held*, that the executor might retain so much of the legacy as was sufficient to satisfy a debt due from the legatee to the testator, at the time of his death, although the remedy for such debt was, at the time of the death of the testator, barred by the Statute of Limitations, 21 Jac. 1, c. 16.

Whether the executor would have had the same right of retainer if the suit had been for payment by himself personally, and not out of the assets of the testator, *quære*. It being admitted, or proved, that advances had been made by the testator to the legatee:—*Held*, that cheques drawn by the testator on his bankers, in favor of, and

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paid by them, to the legatee, were evidence on the question of the amount of such advances ; and that an admission of a debt to the testator, made by the legatee, in his balance sheet, and examination under his bankruptcy, (though it did not charge himself so as to take the debt out of the Statute of Limitations,) was evidences of the character of the advances which had been made, on the question, whether such advances were loans or gifts.

THE testator A. Richardson, by his will, dated in 1825, bequeathed a legacy of 2500*l.* to Robert Hamilton, which he declared should be for his sole use and benefit, and that his receipt alone should be a discharge. The testator afterwards made several codicils to his will, dated in 1830, and 1831, and revoked other benefits which he had given to Robert Hamilton, but did not revoke the legacy of 2500*l.* The testator died on the 26th of December, 1831. The plaintiff, who was the assignee of the legacy of 2500*l.*, filed her bill in January, 1842, against the executors of the testator, for payment of it. At the hearing, the defendants submitted to bring into court a sum to answer the legacy ; and a reference was directed, to inquire whether, at the time of the death of the testator, Robert Hamilton was indebted to him in any, and what, sum of money, with liberty to state special circumstances. The Master, by his report, found that the testator was a gentleman of large fortune, and that, for many years previous, and up to within about two years of his decease, a great intimacy existed between him and Robert Hamilton ; and that Robert Hamilton frequently applied to him for money, with which applications the testator often complied.

The Master then set forth the particulars of several [*540] bills of exchange, drawn by Robert Hamilton on, and accepted by the testator, and afterwards paid by him when at maturity ; and also of several cheques drawn by the testator on his bankers, and payable to Robert Hamilton, or bearer, and afterwards paid by the said bankers ; all of such bills and cheques, except the two last bills, being of different dates, between July, 1823, and December, 1825 ; and the last two bills being dated, one, the 29th of May, 1826, for 100*l.*, and the other the 1st of May, 1827, for 200*l.* The Master also found, that, on the 21st of October, 1824, the testator advanced to Robert Hamilton 1100*l.*, to purchase a full pay company in a regiment of

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foot, and that Robert Hamilton thereupon gave the testator a receipt, as follows :—"Englefield Green, Egham, 21st October, 1824.—Received from A. Richardson, Esq. 1100*l.* for the purchase of a full pay company.—Robert Hamilton, 99th regiment." And the Master found, that by the state of facts of the plaintiff, it was alleged, that the testator, in the year 1824, gave to, and expended for, Robert Hamilton 1100*l.*, in the purchase of his commission, and in getting promotion for him in his regiment; and that the the testator, at various times during the year 1823, and down to 1828, gave to Robert Hamilton several sums of money for his outfit, and to meet the expenses of his regiment; and that the testator did not, at any time during his life, set up any claim or make any demand against Robert Hamilton, in respect of such donations or gifts; and, even if such gifts could have been claimed as debts, the testator well knew the inability of Robert Hamilton to pay the amount thereof; and the testator did not intend that the said alleged debts should be put in suit or otherwise demanded by his executors; or, at least, that the same should be put in suit or demanded against the said legacy of 2500*l.*; and he found, that Bosanquet & Co., by order from, and on account of, the testator, paid to Robert *Hamilton various sums of money in respect of a weekly [*541] payment of 2*l.*, beginning in April, and ending in December, 1831; and he found, that, in certain depositions taken in a cause of *Hamilton v. Williams*, Sir John Hamilton, amongst other things, said, that he knew the testator intimately for twenty years before his death; and that, about the autumn of 1824, when Robert Hamilton was gazetted a captain in the army, the deponent visited the testator, and, in a conversation with him relative to the 1100*l.*, which the testator told the deponent he had given for the purchase of the captain's commission, the testator said, that he (the testator) was very happy in having purchased the commission, and hoped Robert Hamilton would get forward in the army, and that he had made him a present of it, and that he had given him a great deal of money, and should then stop his hand as he had given him so much; and that, late in 1830, the testator told the deponent, that he (the testator) had, when the said commission was purchased, given Robert Hamilton a

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large sum of money for the purpose of fitting him out for his regiment ; and that the testator afterwards told the deponent that he had since given Robert Hamilton another large sum to fit him out a second time ; and the deponent understood from the testator that all the monies which the testator had advanced to or for Robert Hamilton had been advanced as gifts, and not as loans. In opposition to the latter evidence, the Master found, that one Baylis was employed, in July, 1830, by the solicitor of Robert Hamilton to print a certain exhibit, being a book or printed statement of Robert Hamilton, and that the proof-sheets of such statement were sent to such solicitor ; but that, while the said book was being printed, Robert Hamilton once or twice brought some proof-sheets thereof to Baylis, and said, that he had revised and corrected them. And the Master found, that Robert

[*542] Hamilton was compelled to sell his commission ; *but was only allowed so to do on the understanding that 1000*l.*, part of the money to arise from such sale, should remain with the agent of the regiment for the payment of certain creditors of Robert Hamilton, and he found, that, pending the communications with respect to such sale, Robert Hamilton, in a letter to the Secretary of the Commander in Chief, objected to such application of the money to arise therefrom, on the ground, amongst others, of being under the most positive engagements to repay the 1100*l.* originally advanced him by the testator for the purchase of his company.(a) And the Master found, that, after retiring from the army, Robert Hamilton entered into business as a wine merchant, and, in January, 1832, was declared a bankrupt ; and that, in the list of debts stated in the balance-sheet tendered by him on oath, under the commission, to be owing from him, is inserted the item :—"The executors of the late Mr. Richardson. Sundry advances by the late Mr. Richardson ; say, 6000*l.*;" and that, at the Court of Commissioners of Bankrupts, on the 27th of March, 1832, before E. Holroyd, Esq., Robert Hamilton, being sworn and examined, said, that about twelve years before that time Mr. Richardson proposed to him to make advances of cash, and accordingly made advances to him up to the time of his said examination, to the amount of 10,000*l.*,

(a) This was the substance of the statement in the printed book before referred to.

to the best of his recollection : that, about February, 1831, he gave to Mr. Richardson, by his desire, an acknowledgment* of the money which he had advanced, to the amount of 8000*l.*, as far as his recollection served ; and that he believed the said sum of 8000*l.* had been previously advanced to him by Mr. Richardson : that he could not state what amount was owing by him to Mr. Richardson at the end of the year 1825 : that he *occasionally gave to Mr. Richardson his acceptances [*543] and promissory notes for part of the money he had advanced, and a receipt also for 1100*l.* : that the money was occasionally advanced by his acceptances, by cheques, and in money : that he had had frequent conversations with Mr. Richardson since the year 1825 ; and upon one occasion he adverted to the will he had made : he never told him that the money which he had advanced to him from time to time should go as an equivalent, or in satisfaction of any legacy he had left him ;—in fact, he never adverted to the legacy : that Mr. Richardson invariably stated, that he should make him repay the different sums he had advanced, and particularly if he left the army. And the Master found, that, in December, 1832, the fiat was annulled with the consent of the creditors who had proved under it, and that the executors of the testator did not prove any debt under the same, or offer any opinion to the annulling thereof. And the Master disallowed the state of facts and charge of the plaintiff ; and allowed the state of facts and charge of the defendant ; and found, that, at the death of the testator, Robert Hamilton was indebted to him in the sum of 2335*l.*

The plaintiff excepted to the report, for that the master ought to have disallowed the state of facts and charge of the defendants, and allowed that of the plaintiff ; and ought to have certified, that Robert Hamilton was not, at the death of the testator, indebted to him in any sum, or, if any, not more than 300*l.*(*a*)

The case was heard on the exceptions, and on further directions.

The questions in the cause were, whether *Robert [*544] Hamilton, the legatee, was indebted to the testator at

(*a*) The amount of the last two bills of exchanges, ante, p. 540.

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the time of his death ; and, if he was so indebted, whether the whole debt, or that part thereof, of which the recovery was barred by the Statute of Limitations, (a) ought to be retained by the executors out of the legacy.

Mr. *Temple* and Mr. *Rudall*, for the plaintiff.

Mr. *Glasse*, for the executors.

The following cases, in addition to several of those mentioned in the judgment, were cited : *Routledge v. Ramsay*, (b) *Kennett v. Milbank*, (c) *Haydon v. Williams*, (d) *Whippy v. Hillary*, (e) *Higgins v. Scott*, (f) *Mills v. Fowkes*, (g) *Linsell v. Bonser*, (h) *Flower v. Marten*, (i) *Lechmere v. Fletcher*, (k) *Brigstocke v. Smith*, (l) *Pearce v. Davis*, (m) *Aubert v. Walsh*, (n) *Cary v. Gerrish*, (o) *Spears v. Hartly*, (p) *Ex parte Dewdney*, (q) *Ex parte Jackson*, (r) *Eden v. Smyth*, (s) *Wekett v. Raby*, (t) *M'Mahon v. Burchell*. (u)

VICE-CHANCELLOR :—The plaintiff claims to be entitled by assignment to a legacy of 2600*l.* bequeathed by the will of Aldborough Richardson to one Robert Hamilton. The defendants, the executors of the testator, allege, that Robert Hamilton, the legatee, was a debtor to the testator's estate in a large sum of money, and that the amount of the debt ought to be set off against the claim to the legacy, so as to satisfy it in the whole or in part, as the case may be. On the part of the plaintiff, it was argued that there was not, and never had been, any such debt as was suggested by the defendants. It was admitted that advances had been made by the testator to Hamilton, but it was averred that those advances were gifts, and not loans ; and, in consequence of this averment, an inquiry

(a) 21 Jac. 1, c. 16.

(b) 8 Ad. & El. 221

(c) 8 Bing. 38.

(d) 7 Bing. 163.

(e) 3 B. & Ad. 399.

(f) 2 B. & Ad. 413.

(g) 5 Bing. N. C. 455.

(h) 2 Bing. N. C. 241 ; S. C., 2 Scott, 399.

(i) 2 Myl. & Cr. 459.

(k) 1 Crompt. & Mee. 623.

(l) 1 Crompt. & Mee. 483.

(m) 1 Mood. & Rob. 365.

(n) 4 Taunt. 293.

(o) 4 Esp. 9.

(p) 3 Esp. 81.

(q) 15 Ves. 341.

(r) 8 Ves. 533.

(s) 5 Ves. 341.

(t) 2 Bro. P. C. 386, (Toml. ed.)

(u) 3 Hare, 97.

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was at the hearing directed, whether, at the death of the testator, Hamilton was indebted to him in any, and what, sum of money.

If, at the hearing, I had anticipated the course which the cause has taken, I should probably have divided the inquiry into two parts:—first, whether any debt was originally contracted by reason of the advances; and, secondly, whether such debt (if any) or any part of it remained due at the death of the testator. A report following the course of such an inquiry, and giving a specific answer to each question in turn, would have been more convenient for the purpose of further directions. But the course of the proceedings before the master has been precisely such as I have above suggested, and will enable me to dispose of the case on further directions as satisfactorily as that form of inquiry had been directed.

The master, by his report, after stating the advances made by the testator, to Hamilton, has found, that, at the death of the testator, Hamilton was indebted to him in various sums of money, amounting together to 2335*l*. Exceptions were taken to that report, which, in substance, *are, that the [*546] master ought to have found that nothing was due from Hamilton to the estate of the testator, or, at all events, that if not more than 300*l*. was so due.

The arguments in support of the exceptions were, first, that the advances were not proved; secondly, that such advances (if any) as were proved to have been made were gifts, and not loans; thirdly, it was said, that, if the advances were to be considered as loans, the Statute of Limitations was a bar, except as to 300*l*. advanced within six years of the testator's death; and, lastly, it was insisted by the plaintiff, in reply to a case made by the defendants, that there was no acknowledgment by Robert Hamilton to take the debt out of the statute.

In order that the grounds of my decision may distinctly appear, I shall, in the first instance, consider the exceptions only. And upon this part of the case I may observe, that, in the Master's Office, as in the cause, the fact that advances had been made by the testator to Hamilton was a fact not in dispute; the issue was not upon the fact, but only upon the character of the

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advances,—whether gifts or loans. In order to determine that question, the master had before him certain books, receipts, bills of exchange, cheques, and other documents. It was contended that the evidence, upon which the master must have acted, was, to a considerable extent, founded on cheques alone, and it was said that a cheque was no evidence of a debt. Unquestionably, cheques are given quite as often for the payment of debts as they are for loans; and no one, I apprehend, would contend that a cheque was conclusive evidence of a debt. But that was not the purpose for which the cheques were used. The advances were admitted in the state of facts, which is in the nature of pleadings; and therefore, the advances being admitted, the [*547] cheques would be *evidence of the amount of such advances, and that I take to be the only purpose for which the master has used them.

Assuming the master to have ascertained, that advances to a certain amount were made, he had then to consider whether they were gifts or loans. Now, it appears that Hamilton became bankrupt, and before the assignment under which the plaintiff claims the legacy, Hamilton represented by his balance-sheet, and his examination in the bankruptcy, that he was a debtor to the testator to the amount of 6000*l.*; and, on his examination, he specified the particular sum of 1100*l.* as having been advanced for his commission. It was argued for the plaintiff,—and, for the reason I am about to mention, I am inclined to agree with that argument,—that the admission made in the bankruptcy was not such an acknowledgment of the debt, as would take the case out of the statute. But, on the question whether a debt was owing by the bankrupt, why am I not to hold that the admissions of a party made in his balance-sheet, and upon his examination, are evidence that the advances made to him were loans, and not gifts? and, if so, there was an admission of debt to an amount far exceeding what the master has found. The case, however, did not rest on that evidence alone. A printed book was produced, in the printing and publishing of which it was proved that Robert Hamilton took an active part; and a letter was also in evidence, written by him, referring to the same book, and he there expressly states, that the 1100*l.* had been advanced

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to him by the testator, and constituted a debt which he was bound to pay. Opposed to this was the evidence of Sir John Hamilton, who says positively that the testator stated to him the 1100*l.* was a gift. With respect to all the other advances, Sir John Hamilton *says, that, from general conver- [*548] sations with the testator, he believes they were gifts; but I cannot take his evidence as applying distinctly to anything except the 1100*l.*; and, with respect to that sum, it is opposed to the positive statement and oath of the legatee, coupled with the possibility that Sir John Hamilton may have been mistaken. The only other evidence is that of a servant of the testator, on which I shall only observe, that it is of such a nature, that I am not disposed to believe it in opposition to the statement of the legatee himself. If the meaning of the testator was different from that which he communicated to Robert Hamilton, I must think that he would have taken some other means of making it known than that of gossiping with a servant. The distinction between a loan and a gift depends on the question, whether the testator did or did not retain to himself a right to demand payment of the money; and, therefore,—whether he intended the advance to be a gift, or whether he lent it to a man who he thought could never repay him,—if the testator reserved to himself the right of recovering the money, it was a loan, and not a gift. My opinion is, that the master was right in finding that these advances were loans, and not gifts.

The next question is, what was the amount of the debt? The 300*l.* was not barred by the statute at the testator's death. The 1100*l.*, I think, is also sufficiently proved to have been taken out of the statute of limitations by the letter written by Robert Hamilton to Lord Fitzroy Somerset. I shall presently observe on what, under the late statute, I understand to be the law with respect to the acknowledgment, taking the case out of the statute. Now, the amount of the balance is only shown in two ways—by the balance-sheet, and the examination under the bankruptcy. Two objections were *taken to this: one [*549] was, that the amount of the balance was not specified in the balance-sheet or in the examination; and *Kennett v. Mil-*

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bank(a) was cited as an authority, that, under the recent statute, it was necessary that the amount should be stated. That proposition certainly surprised me. I had always understood that the same acknowledgment that would have sufficed before Lord Tenterden's act would suffice after it,—with this difference, that, since the act, the acknowledgment must be in writing ; whereas, before the act, a verbal acknowledgment would have been sufficient. On a careful examination of *Kennett v. Milbank*, I very much doubt whether the Lord Chief Justice meant to lay down what one part of the judgment would seem to imply. Certainly, the other judges advanced no such proposition ; and the case of *Haydon v. Williams(b)* contains a judgment by the same learned judge to the contrary effect. The difference due to any dictum of Chief Justice of the Common Pleas naturally drew attention to the point, and the moment an opportunity occurred, it was brought again under the view of the court ; and, in *Lechmere v. Fletcher(c)* and *Waller v. Lacy(d)* it was expressly decided, that it was not necessary the amount should appear. There can be no doubt, that, if a person before the statute had written to a stranger, and said, "I owe A. B. a sum of money upon a balance of account," that acknowledgment, made to another person, might have been taken advantage of ; an action might have been sustained upon it, and the balance proved ; and such, I apprehend, to be the law now.

But the question remains, whether this is an acknowledgment to take the case out of the statute ; and the [*550] *rule as to that, on the authority of the cases cited, I take to be, that the acknowledgment must be one whereby the party charges himself. If he acknowledges a debt, and says nothing more, the court implies a promise to pay the debt ; but, if his promise is to pay out of a particular fund, or if he only points out where payment is to be had, that is not an acknowledgment whereby he charges himself ; and, therefore, it does not take the case out of the statute, except as regards the particular fund referred to.(e) That being the state of the case, I

(a) 8 Bing. 38.

(b) 7 Bing. 163.

(c) 1 Cr. & Mees. 623.

(d) 1 Man. & Gr. 54.

(e) See ante, p. 300.

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have heard no argument to satisfy me that a compulsory acknowledgment, drawn from a party in bankruptcy, where the object of the proceeding is not to charge the party, but to discharge him, and distribute his assets, could be an acknowledgment taking the case out of the statute. Upon that point, therefore, I am not, as at present advised, prepared to agree with the master, assuming that that was the only evidence the master went upon for taking the case out of the statute. My general conclusion, therefore, upon the whole report would be, that the master was right in finding that the advances were loans, and not gifts; and in his finding as to the amount of those loans; but, probably, that I differed from him as to the legal sufficiency of some of the admissions upon which he had taken the debt out of the statute.

Supposing, then, that I should come to the conclusion that the master has miscarried on the last-mentioned point, the regular course would be to refer the case back to the master to review his report in that particular only in which I differed from him, directing the master, in case he should find any debt barred by the statute of limitations, to state the amount and particulars *of such debt,—not giving any costs upon the [*551] exceptions; and if the defendants should not adduce any further evidence before the master, the master would make a further report by rejecting so much of the debt as was barred by the statute, and rejecting it only upon that ground. It occurred to me, therefore, that I might, in a case so circumstanced, assume, for the purposes of the argument upon the report now before me, that the debt was barred by the statute, (an assumption the most favorable for the plaintiff,) and require the parties to argue the question, whether, upon that assumption, the defendants were not entitled to retain the legacy claimed by the plaintiff, in satisfaction or part satisfaction of the debt owing by him to the estate. This is the question which would arise upon the further directions, if the master were to correct his report in the way I have suggested; and if that question is to be answered in the defendants' favor, the reference back to the master would be so much useless expense and delay. The order on further directions would be the same, in whichever way the report

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should stand. Accordingly, the cause was, upon my suggestion, set down upon further directions; and the question was very fully argued upon the above assumption, and every topic, which could be urged, was, I believe, suggested to me. I am now to state the conclusion to which I have come upon it.

The Statute of Limitations that governs the present case is the 21 Jac. 1, c. 16, which takes away the remedy against the debtor, unless the action be brought within six years after the cause of action arose; but it leaves the right untouched, differing in this respect from a more recent Statute of Limitations, by which the right as well as the remedy is barred. In accordance

with this construction of the act, it has been repeatedly [*552] *decided, and is settled law, that, if a creditor, by means

of a lien or other lawful means, can pay himself without resorting to an action against the person of the debtor, he may lawfully do so. In *Spears v. Hartly*,^(a) which was a case of trover, the defendant, a wharfinger, claimed a lien upon merchandize in his hands for the balance of a general account, which, it was held, he was entitled to; and the only question then was, whether, as the balance which the defendant claimed, was due to him nine or ten years before the action was brought, the debt was not discharged by the operation of the Statute of Limitations, and the lien, therefore, gone. Lord Eldon said it was true, that, if the debt was discharged by the statute, there could be no lien by reason of it; but the debt was not discharged, it was the remedy only. He says, "I am of opinion, that, though the Statute of Limitations has run against a demand, if the creditor obtains possession of goods in which he has a lien for a general balance, he may hold them for that demand by virtue of the lien. In this case the defendant had a subsisting demand when the goods came to his possession, and I am of opinion he may enforce it by the lien which the law has given him for his general balance." *Higgins v. Scott*^(b) is an authority also in point. If a debtor pays money to a creditor, without directing the appropriation, the creditor, having acquired a right to apply it, may apply it in payment of a debt barred by the Statute of

(a) 3 Esp. 81.

(b) 2 B. & Adol. 413.

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Limitations. *Mills v. Fowkes*(a) is also an authority upon the subject, and I may refer also to *Coppin v. Coppin*,(b) and *Williamson v. Naylor*.(c) I shall assume, for the purpose of the argument in this case, as being favorable to the plaintiff, that the right which the law gives to the creditor, having a lien on *the goods or other property of the debtor, does not [*553] enable a debtor effectually to plead, by way of set-off, a debt barred by the Statute of Limitations; that is, I shall assume that the plaintiff might reply the Statute of Limitations in answer to such a plea, as in *Chapple v. Durston*,(d) and *Field v. Bezant*.(e)

The question, then, is, whether the present case is to be governed by the principle of the former or of the latter cases? If the executor had made himself personally liable to the payment of the legacy, or if the object of the suit had been to charge the executor personally, the principle of the latter cases might possibly have governed this case. But this is not a suit for that purpose; it is a suit to recover a legacy out of assets,—that is, claiming a portion of the assets in the hands of the executor; and the claim is not made in any other way. The case is the same as if the assets were in the hands of the accountant-general. Now, to say that the right remains, and that the remedy only is barred, is, in a case like this, the same thing as saying that the legatee has already in his hands, to the amount of his debt, those assets of the testator which he seeks by his suit. Several ways of putting the case may be suggested in support of the argument on the part of the executors. They may say to the legatee, “We admit your right to the legacy; you have assets of the testator in your hands; pay your legacy *pro tanto* out of those assets;” as in *Jeffs v. Wood*,(f) and *Campbell v. Graham*.(g) Again, the executor might say, “You ask for a portion of the assets of the testator; but you are yourself a debtor to the testator’s estate, and his assets are diminished *pro tanto* by your default: it is against *conscience that you should take anything [*554]

(a) 5 Bing. N. C. 455.

(b) 2 P. Wms. 291.

(c) 3 Y. & Coll. 208.

(d) 1 Crom. & Jer. 1.

(e) 5 B. & Adol. 357.

(f) 2 P. Wms. 128.

(g) 1 Russ. & M. 453.

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out of the estate until you have made good what you owe to it;" and the equity of a trustee to impound the interest of a *cestui que trust* in the trust fund, under such circumstances, is clear: *Priddy v. Rose*,^(a) *Smith v. Smith*,^(b) *Ex parte Turpin*.^(c) To such a case, the rule, that he who would have equity must do equity, would apply by way of rebutter to the plaintiff's demand.

A third argument may, perhaps, be suggested, though I do not place any reliance upon it. If the testator had been living, and the statute had been pleaded to an action by himself, he might have enforced his claims to the amount of the legacy, by cancelling the legacy in his will. Now, if the will was made on the supposition that the debt existed, it was, in contemplation of law, made on the supposition that the debt would be paid; and if the circumstances under which, and with reference to which, the will was made became altered by the act of the legatee, is it not possible that a court of justice, in this case, as well as in many others, might hold the altered circumstances to operate as a revocation? I do not, however, as I have said, rely upon the last point; I think the first and second points are decisive of the case.

In order, then, to save the parties the expense and delay of a useless reference and report, I shall declare, that no order is made upon the exceptions, and order *the report to be confirmed notwithstanding the exceptions*; and, upon further directions, declare, that the amount of the debt ought to be set-off or retained against the legacy, the balance due to the legatee, if any, to carry interest, and give no costs on either side.

[*555] "This is a course which I have taken on more than one occasion, when it appeared that the order on further directions must be the same whichever way the report should be, and is one which may, I believe, be always taken with advantage to the suitor where such is the case. If a court of appeal should be of opinion against my judgment on the main point, it will, of course, alter it. If I am right in that, I do not anticipate any disapprobation of the course I have taken in point of form.

(a) 3 Mer. 86.

(b) 1 Y. & Coll. 338.

(c) Mont. 443.

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ATTORNEY-GENERAL *v.* POULDEN.

1844:—30th April, and 2nd May.

Direction to invest 10,000*l.* 4*l.* per cent. Stock, in the name of trustees, and to pay thereout annuities to various persons, amounting in the whole to 400*l.* a-year; and that the trustees should hold the said stock and the dividends thereof, subject to the annuities upon trust, as to so much of the dividends as from time to time should fall in by the determination of the annuities, until one-half of the dividends should have so fallen in, to invest the same and the resulting income thereof, in order to increase the capital of the said fund by accumulation; and so soon as one-half of the dividends should have so fallen in, to apply such moiety of the dividends, and also such further parts of the same as should from time to time fall in by the determination of the annuities respectively, and the whole of the dividends, when all the annuities should have ceased, to certain charitable uses. The 10,000*l.* 4*l.* per cent. Stock was invested according to the will, and was subsequently converted into 3½ per cents., and the trustees thereupon reduced the payments to the annuitants by one-eighth, the dividends having become to that extent insufficient to answer the annuities. The death of some of the annuitants afterwards released a part of the dividends, and the sums so falling in were accumulated. In an information to establish the charity:—*Held*, that, although the accumulation of the dividends had not begun until the death of an annuitant, many years after the death of the testator, yet, by the statute 40 Geo. 3, c. 98, the accumulation must cease at the expiration of twenty-one years from his death.

That the annuitants were not entitled to be paid their annuities in full, either out of the capital, or out of the released dividends, but that the reduction of the stock would operate to produce a proportionate reduction in the several annuities, and in the fund applicable to the charity.

That the whole of the accumulated fund, arising before a moiety of the dividends was released by cessation of the annuities, was undisposed of by the will, and formed part of the residuary estate.

T. FITZHERBERT, by his will, dated in June, 1821, amongst other things, directed his executors, as soon as conveniently might be after his decease, to set apart and transfer or purchase and invest in the names of certain trustees the sum of 10,000*l.* 4*l.* per cent. Annuities, to be a fund to answer the several yearly sums *by way of annuities to the several persons [*556] thereafter named, or in the event of the death of any one or more of them in his (the testator's) lifetime, then to such other person or persons as he should or might nominate and appoint in his or their place, by any codicil or codicils, so that each

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of them might have his or her annuity for his or her life ; (that is to say :) [the testator then named the annuitants, and the amount of their several annuities, which amounted in the whole to 400*l.* a-year.] And the testator directed that the said several annuities should be paid by his trustees unto the respective annuitants by half-yearly payments, as the dividends of the 10,000*l.* Stock should become payable ; and that, subject to the payment of the said several annuities during the continuance thereof respectively, the said sum of 10,000*l.* Stock should be held by the said trustees. After bequeathing some other legacies, the testator devised and bequeathed all the residue of his real and personal estate (such personal estate to be subject, nevertheless, to the payment of his debts, funeral expenses, and such of his legacies for which no specific funds were provided, or which would otherwise fail for want of a fund) unto his sisters Mary and Jane, their heirs, executors, administrators, and assigns, in equal shares, as tenants in common, for their own use ; and he appointed his said sisters and the said trustees his executrixes and executors. On the 11th of June, 1821, the testator made a first codicil to his will, and thereby, after reciting so much of the will as related to the 10,000*l.* Stock, he declared his will to be, that the said trustees should stand possessed of the said sum of 10,000*l.* Stock, and the dividends, interest, and yearly proceeds thereof, subject to the said annuities charged thereon by his will,—as to so much of the said dividends, interest, and yearly proceeds as from time to time should fall in by the determination of the annuities charged thereon, until one *half [*557] of the said dividends, interest, and yearly proceeds should have so fallen in, upon trust, to lay out the same, and the resulting income thereof, in the names of the said trustees for the time being in the purchase of stock, in the same fund, or in some other of the public funds or stocks, in order to increase the capital of the said fund by accumulation in the way of compound interest ; and when and so soon as one half of the said dividends, interest, and yearly proceeds should have so fallen in, then upon trust to apply such moiety of the dividends, interest, and yearly proceeds, and also such further parts of the same as

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should from time to time fall in, by the determination of the said annuities respectively, and the whole of such dividends, interest, and yearly proceeds, when all the said annuities should have determined, in the manner thereafter expressed: namely, that all such dividends, interest, and yearly proceeds should be applied by his said trustees, from time to time, for and towards the maintenance and support of five poor men, married or single, ten poor widows, and five poor single women, natives of Portsea, who respectively should be of the age of fifty years or upwards, to be chosen as therein mentioned. The testator then appointed certain persons to act as governors of the charity thereby created, and provided for the appointment of new trustees of his will and codicil, upon the death or retirement of any of those thereby appointed. By another codicil, the testator substituted the children of one of the said annuitants, who had since died, in the place of such annuitant.

In 1830, the 10,000*l.* 4*l.* per cent. Stock were reduced to 3½ per cents., and the annual dividends, applicable to the payment of the annuities charged thereon, being thereby reduced to 350*l.*, the trustees made a proportionate abatement in such annuities, reducing the payments by one-eighth. Subsequently, several of the annuitants *died, and their annuities fall- [*558] ing in, an accumulated fund was produced, which, after certain payments thereout, amounted to 698*l.* 19*s.* 4*d.*, of which the sum of 613*l.* 13*s.* 9*d.* had accrued before, and the remainder after the expiration of twenty-one years from the death of the testator.

The information was filed in December, 1843, against the trustees and the representatives of the residuary legatees, for the execution of the trusts of the will, and the establishment and regulation of the charity.

The questions submitted to the court at the hearing were, first, whether the annuities ought absolutely to abate by one-eighth, in consequence of the reduction of the 4*l.* per cent. Stock, into 3½ per cents., or whether the amount by which the annuities had been respectively reduced at the time of the conversion should be made up to the annuitants and their representatives

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again, from time to time, as portions of the dividends were released by the death of annuitants; secondly, how long the accumulation of the dividends ought to go on with reference to the Thellusson Act,^(a)—whether, for twenty-one years from the death of the testator, when the trust commenced, or for twenty-one years from the death of the first annuitant, when the accumulation first began; thirdly, whether the accumulated fund belonged to the charity, or to the residuary legatees, or was undisposed of by the will; and fourthly, whether, supposing the accumulations during the period of twenty-one years from the death of the testator belonged to the charity, the accumulations since the expiration of such twenty-one years would also belong to the charity or to the residuary legatees.

[*559] *Mr. *Cooper* and Mr. *Wood*, in support of the information.

Mr. *Romilly* and Mr. *Allnutt*, for the residuary legatees.

Mr. *Anderdon* and Mr. *E. R. Adams*, for the annuitants.

In support of the claim of the annuitants—*Davies v. Wat- tier*,^(b) *May v. Bennett*,^(c) *Arundell v. Arundell*,^(d) *Foster v. Smith*,^(e) *Page v. Leapingwell*,^(f) were cited against the claim of the annuitants; and *Kendall v. Russell*,^(g) *Scott v. Salmon*,^(h) in favor of that claim. On the date at which the accumulation should cease, *Webb v. Webb*,⁽ⁱ⁾ *Trickey v. Trickey*,^(k) and *Hargrave* on the Thellusson Act, p. 171.

The VICE-CHANCELLOR, after holding that the dividends, released by the deaths of the annuitants, must, under the act 40

(a) 39 & 40 Geo. 3, c. 98.

(c) 1 Russ. 370.

(e) 2 Y. & C. C. C. 193.

(g) 3 Sim. 424.

(i) 2 Beav. 493.

(b) 1 Sim & St. 463.

(d) 1 Myl. & K. 316.

(f) 18 Ves. 463.

(h) 1 Myl. & K. 363.

(k) 3 Myl. & K. 560.

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Geo. 3, c. 98, cease to accumulate at the expiration of twenty-one years from the death of the testator, notwithstanding that the accumulation did not commence until some years after the death of the testator; and holding, also, that the accumulations which had accrued subsequently to such period of twenty-one years would fall into the residuary estate :—

The next question is, whether the annuitants are or *are not to be paid in full their annuities, either by re- [*560] ducing the capital, which has been set apart to secure them, or by postponing the interest of the remaindermen till the arrears of the annuities have been paid; that is to say, whether the annuities are to be paid in full at the expense of the charity, or whether the charity and the annuities are to bear the loss sustained by the reduction of the stock in proportion to their respective interests? On this point I have not the slightest doubt that the loss must be borne by the annuitants and the charity rateably. The testator has directed a sum of 10,000*l.* 4*l.* per cent. stock to be invested in the names of trustees, which is, in fact, a direction to purchase so much stock as will produce an income of 400*l.* a-year; and then, after giving directions, that, on the death of the annuitants, the dividends which should become discharged should accumulate until one-half of such dividends should be liberated, the testator directs that the moiety so liberated shall go the charity; that, as the remaining annuities should become released, the fund shall be given to the charity *pro tanto*; and, when all the annuitants are dead, then the whole fund is to be applied for the benefit of the charity. The testator obviously supposed that the 10,000*l.* stock would remain unaltered. He no more contemplated a reduction of interest on the stock than he contemplated the possibility of a misappropriation of the fund by the trustees, either of which events would occasion a loss to the annuitants and the remaindermen; and he has made no provision for the event which has happened. How, then, is the case affected by what has been done? The executors set apart 10,000*l.* 4*l.* per cent. bank annuities in the names of trustees, and the moment that was done, and the 10,000*l.* severed from the bulk of the estate, the relation of tenant for life and remainderman began, and the interests of the

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parties became fixed. The directions are, that the [*561] 10,000*l.* 4*l.* per cent. stock, *when set apart, shall be a fund to answer the annuities thereafter given, and the testator afterwards says, that, subject to the annuities, it is to go to the charity. That, certainly, is consistent with the supposition that the charity is to take only that which remains after paying all the annuities in full ; but it is equally consistent with the other construction. The real question is, whether this is to be taken as a case of tenant for life and remainderman, or whether as a gift to the charity of the residue of the 10,000*l.* which shall remain after paying the annuities in full ; and I think the construction I have put upon it is the true one.

With regard to the other question, the testator directs, that, as the annuitants die, so much of the dividends as is released by their deaths shall be invested in 4*l.* per cent. stock, and that the interest and dividends thereof shall accumulate until one-half of the dividends are released ; and, as soon as that happens, then he specifies the mode of application of the dividends. The direction for application, however, is not so framed, as to include the accumulated fund. I have no doubt the testator intended that fund also for the charity ; but his expressions exclude it. He has directed accumulation until one-half of the dividends are released, and then he directs the charity to take the benefit of the released dividends. In consequence of this direction, it became necessary to stop the direction for accumulation, in order to give the charity that benefit, and the testator has (if I am right in supposing he meant to give the whole to the charity) forgotten to resume his intended direction as to the fund accumulated. If the words were flexible, the court ought to construe them so as to give the charity the benefit of the accumulated fund. It is possible, however, that the testator may have intended to postpone the benefit to the charity until he had [*562] accumulated a *fund for some other purpose, which he intended afterwards to indicate. However that may be, the words are not flexible, but are distinct and precise ; and I must hold that the accumulated fund is undisposed of, and that it consequently forms part of the residuary estate.

1844—Mackintosh v. Wyatt.

MACKINTOSH v. WYATT.

1844: June 19th.

A creditor took, as security for his debt, bills of exchange drawn and indorsed by a surety, and accepted by the principal debtor. After those bills were dishonored, the creditor drew accommodation bills on, and which were accepted by, the principal debtor, but were paid by the drawer when at maturity. On a bill filed by the surety, to restrain an action subsequently brought against him on the bills which had been dishonored, the court allowed the action to proceed, but stayed execution. Whether the surety was discharged by the subsequent transactions which, without his knowledge, took place between the creditor and the principal debtor, *quære*.

GREEN was indebted to Wyatt & Co., and, in 1827, he gave them a valuable picture by Murillo, on trust, as declared by an indenture, to sell the same, and pay themselves the expenses and their debt out of the proceeds. In 1829 Wyatt & Co. applied to Green for other security, and the plaintiff, at the request of Green, became surety for him to Wyatt & Co. for 2500*l*. This security the plaintiff gave by drawing eight bills of exchange upon Green for 312*l*. 10*s*. each, payable at successive intervals of six months, which bills were accepted by Green, and indorsed and delivered by the plaintiff to Wyatt & Co. The transaction was further evidenced by a memorandum, dated the 22nd of February, 1829, indorsed on the assignment of the picture, expressing the terms of the arrangement; and, amongst others, that the 2500*l*., to be paid by such instalments, should be accepted in full discharge of a debt of 3128*l*., thereby acknowledged to be owing by Green; but, on default of payment of any of such bills on the day specified, Wyatt & Co. should be at liberty to demand and recover from Green, the whole debt; that the picture should not be a security for more than the plaintiff became surety for, namely, 2500*l*.; and that, when the 2500*l*. should be paid to Wyatt & Co., they should deliver over the *pic- [*563] ture to the plaintiff, as a security to him for what he might have advanced on account of the bills. The bills were not paid. In 1844(a) Wyatt & Co. brought their action against

(a) It was a part of the plaintiff's case, that he was not to be sued upon the bills until certain funds came to his hands; laches was, therefore, excluded.

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the plaintiff, for the amount of the bills and interest. The plaintiff thereupon filed his bill in this cause, alleging, first, that, after the first of the eight bills of exchange had become due and been dishonored, Wyatt & Co., without the knowledge of the plaintiff, drew several other bills of exchange on Green, in respect of the said debt, payable at divers long periods after date, which bills were accepted by Green, and delivered to Wyatt & Co.; and that the effect of such transactions was either to pay and discharge the original debt for which the plaintiff was surety, or to give Green a very extended time for the payment thereof, with the consent of the plaintiff, and so as to deprive Wyatt & Co. of the power reserved to them by the said memorandum, to have and demand immediate payment from Green of the original debt, in the event of any of the eight bills being dishonored: secondly, that, upon the true construction of the agreement upon which the plaintiff became surety, he was liable only to the extent of 2500*l.*, and was not liable to any demand for interest on that sum: and, thirdly, that Wyatt & Co. had so dealt with the picture, that they had put it out of their power to fulfil their agreement to transfer it to the plaintiff, upon the payment by him of the 2500*l.* The bill prayed a declaration, that the plaintiff was discharged from his liability on the bills of exchange; or, if not, that he was not liable for interest thereon: and that, in the latter case, an account might be taken of what was due from him, and, upon payment thereof, that the defendants might be decreed to deliver up the picture free from any claim thereon; and for an injunction.

The answer was put in before the common injunction could be obtained. By the answer the defendants denied the alleged agreement, that the plaintiff should be exonerated from the demand for interest: they admitted that the picture had, for the convenience of exhibition for sale, been deposited in the house of a person who afterwards became bankrupt, and that a claim to the picture, as being in the order and disposition of the bankrupt, had been made by his assignees; that, upon an agreement with such assignees, the picture had since been placed for sale in other hands, and that, under such circumstances, they were not able to deliver up the picture; but they said, that, if the

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plaintiff would pay the principal due on the eight bills of exchange, with interest thereon, the costs of the action, and the costs and charges properly incurred in respect of the picture, the defendants would be able to deliver up the picture to the plaintiff, so far as they were authorized to do so by the memorandum of February, 1829. And with regard to the allegation, that time had been given to the principal debtor, the defendants, denying the fact that any time had been given, said that the debt, for which they had taken the security in question from Green and the plaintiff, was incurred for goods supplied to Green, in his business of a sadler; and that, prior to 1826, Green had been in the habit of accepting accommodation bills drawn by Wyatt & Co., for which Wyatt & Co. provided the means of payment when they became due, and that the same system of accommodation continued between Wyatt & Co., and Green, until Green retired from business in 1831, and was then continued between Wyatt & Co. and the successors of Green in his business; but such transactions as to acceptance were, and were always *treated by all parties as, entirely distinct from the [*565] transactions out of which the debt, for which the security was given, had arisen, and were not in any manner connected with such debt. A schedule of the bills, described as accommodation bills, was set forth in the answer, and the aggregate amount far exceeded the debt for which the plaintiff was surety.

The plaintiff moved upon the answer for an injunction to restrain proceedings in the action brought against him, upon the bills of exchange, of which he was the drawer.

Mr. *Kenyon Parker* and Mr. *Rolt*, for the motion, relied chiefly upon the admission in the answer, that the defendants Wyatt & Co. had drawn bills upon Green, the principal debtor, since some of the bills drawn by the plaintiff as surety, and accepted by Green, had been in the hands of Wyatt & Co. at maturity, and dishonored. The presumption of law would be, that a creditor, drawing a bill of exchange on his debtor, drew it in respect of his debt; that, at least, was the effect of the transaction *prima facie*. Was there, then, anything to obviate that effect in the

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transaction described upon the answer? There was no allegation that the bills drawn by Wyatt & Co. on Green were accepted in pursuance of any definite contract, unless the giving to them the mere appellation of "accommodation bills" carried with it an implied averment of some distinct and special contract under which Wyatt & Co. were not to receive the benefit, that, according to the import of the transaction, they would have. But, even supposing that the term "accommodation bill" in pleading imported an instrument upon which the ordinary liability of drawer and acceptor, as between each other was reversed; yet the accommodation bills in this case materially varied the relative situation of the principal and surety. If the creditor placed himself in a situation in which he could not sue the principal, for however short a period the disability lasted, he ceased to have a right to sue the surety: *Boulton v. Stubbins*; (a) because he, to that extent, abridged the remedy of the surety, who could only stand in the place of the creditor against the principal. On this ground it was doubted whether, on giving indulgence to the principal debtor, an express reservation of other securities was not ineffectual even against that debtor, as being repugnant to the contract. (b) It was no answer here, that, when the accommodation bill had been taken up and paid by the drawer, the parties were, or might have been, in the same situation as they were in before it was accepted: *Bonsell v. Cox*. (c) The surety was entitled to be consulted before the remedy against the principal debtor was to any extent fettered or restricted,—it was for the surety to judge whether he would or would not be prejudiced by the arrangement: *Boulton v. Stubbins*; (d) and any arrangement having that effect, made without his consent, discharged him from his liability. The simple question was, whether the accommodation bills in this case did restrict or fetter Wyatt & Co., so as to impede them in putting the bills drawn by the plaintiff in suit against Green: it could not be doubted that such was their effect. After Green had accepted and become liable on bills to a large amount, of

(a) 18 Ves. 20.

(b) 18 Ves. 26.

(c) 4 Beav. 379.

(d) Per Lord Eldon, 18 Ves. 21.

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which Wyatt & Co. had received the benefit, would not this court have restrained Wyatt & Co. from suing Green upon the first bills, the amount of which they actually had in their hands by the effect of the second transaction? This was not, like the case of *Eyre v. Everett*,^(a) a new transaction, which left the first untouched. It operated to give the principal debtor, for a *certain time, at least, a right in equity to be pro- [*567] tected from a suit founded on his original debt. The court, in such circumstances, would restrain the proceedings at law against the plaintiff. His defence is, in this case, more especially of an equitable nature; but, even if the same principle would discharge him also at law, a court of equity would not send him to a court of law for the discharge to which he was equally entitled in this court: *Samuell v. Howarth*.^(b) The answer denied that time had been given, but that was a conclusion of law of which the court would judge from the facts that appeared.

Mr. *Romilly* and Mr. *Baily*, for the defendants Wyatt & Co., were not required to address the court against the motion.

The VICE-CHANCELLOR, after disposing of the two points with reference to the interest, and the picture, on the ground, that, as to them, no equity was confessed upon the answer, said, that, without expressing any opinion on the effect which the accommodation bills might have had upon the liability of the surety, he was of opinion that the right course would be to allow the action at law to proceed, and to stay execution. The same point might be raised and determined in the action, the rules of equity and law on the subject being perfectly similar.^(c)

THE defendants to be at liberty to proceed with the action to trial and judgment but not to issue execution for a fortnight after judgment, and to deal with the judgment as this court shall direct. The plaintiff to pay into court the amount recovered in the judgment (if any) within a fortnight after judgment, unless the court make other order to the contrary. Liberty to apply.

(a) 2 Russ. 381.

(b) Per Lord Eldon, 3 Mer. 278.

(c) See *Barnard v. Wallis*, Cr. & Ph. 85.

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*JONES v. MOSSOP.

1844: 8th and 10th June; 24th July.

A. was indebted on bond to B. B. died, leaving C. his sole next of kin, who obtained letters of administration of his estate. The estate of B. after, all debts, &c. were paid, left a clear residue exceeding the amount of the bond debt. A. became surety for C. by joining in promissory notes. C. became an insolvent debtor, and A. was compelled to pay the notes. C. died, and then the assignee under his insolvency took out letters of administration *de bonis non* of B., and sued A. on the bond:—*Held*, that A. might set off the sums which he had been compelled to pay as surety for C. against the bond debt.

The obligor in a bond, becoming surety for advances to the obligee, and being, after the insolvency of the obligee, compelled to pay the debt for which he had become surety, is entitled to set off the sum so paid against the amount due upon the bond.

THE plaintiff executed his bond, dated the 29th of September, 1834, in the penal sum of 1000*l.*, conditioned for the payment by him of the sum of 500*l.* to John Reed, his executors, administrators, and assigns, with lawful interest thereon. John Reed died on the 1st of January, 1835, intestate, leaving Richard Reed his only child and next of kin, and, as such, entitled to a clear residue of his personal estate of several thousand pounds. In consequence of a pretended will of John Reed being propounded in the Ecclesiastical court by another party, and of the litigation which thereupon ensued, Richard Reed was not able to obtain letters of administration of his father's estate until August, 1838. During this interval Richard Reed was in want of money, and in July, 1835, John Bevan advanced him 100*l.* upon the security of the joint and several promissory note of the plaintiff and two other persons as sureties for the re-payment of such advance and interest. John Bevan afterwards advanced the plaintiff a further sum of 200*l.*, secured by the promissory note of Richard Reed, and the plaintiff, and another person, as his sureties. The plaintiff also lent Richard Reed some sums of money, amounting together to about 50*l.* Upon Richard Reed obtaining the grant of administration to his father's estate, the bond being a part of the net residue of that estate, became legally and equitably the absolute property of Richard Reed, and he became entitled to the money due thereon for his own use and benefit. In 1838, Richard

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Reed was imprisoned for debt in Cardiff jail. On the 30th of January, 1839, *a vesting order, under the statute 1 & 2 Vict. c. 110, was made against him, and, in July following, the defendant was appointed assignee of his estate and effects. Richard Reed died in January, 1840. [*569]

The plaintiff was, in December, 1840, compelled to pay John Bevan the sums due on the promissory notes, amounting to 377l. After the death of Richard Reed, the defendant obtained letters of administration de bonis non of John Reed, and commenced an action against the plaintiff upon the bond.

The bill stated, that the defendant intended to proceed to judgment, and issue execution for the whole amount of principal and interest secured by the bond ; whereas the plaintiff had offered and requested to come to an account with the defendant of what was due upon the bond, and upon the said payments made by the plaintiff, and had requested the defendant to accept the balance of such account in full satisfaction and discharge of his said bond. The bill charged, that the plaintiff was entitled to the same relief in equity, as if Richard Reed was living ; that all the debts, and funeral and testamentary expenses, of John Reed had been paid, and all the duties of administration discharged ; and that whatever the defendant should be able to recover, as administrator de bonis non of John Reed, would belong to the defendant absolutely, and that he meant to retain and appropriate the same in his character of assignee of Richard Reed. The bill prayed, that, as against Richard Reed, as the equitable and beneficial owner of the bond, and the monies secured thereby, and against the defendant as assignee, it might be declared that the plaintiff was entitled in equity to set off and be allowed the monies so advanced and paid by the plaintiff to and for Richard Reed, and the monies paid by the plaintiff, *as the surety of Richard Reed, in satisfaction [*570] of the promissory notes ; an account and injunction.

The common injunction issued to restrain the action. The defendant, by his answer, in substance admitted the facts above stated ; and he then obtained the order nisi.

Mr. Romilly and Mr. W. M. James, for the plaintiff, appeared

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to show cause on the merits against dissolving the injunction. They insisted, that, if Richard Reed had been living, and his property had not been aliened by the effect of the vesting order, he could not have enforced payment of the bond from the plaintiff, without paying to the plaintiff the sums which the latter had advanced for him, or owing to his default: that neither the death of Richard Reed, nor the vesting order, could affect the equities of the parties. The death of Richard Reed left that, which was a part of the estate before, a part of his estate still; and the assignee in his insolvency could be in no better situation than Richard Reed himself. Although the promissory notes were paid after the vesting order, they were paid in respect of an obligation previously incurred; and the time of the payment, therefore, did not affect the question of the right to set off the amount against the bond debt.

Mr. *Russell* and Mr. *Fleming*, for the defendant, relied on the fact, that the demands were owing in different rights: one claim was by the administrator of A.,—the other against the assignee of B.; that the rights of the parties at the utmost must be determined at the date of the vesting order, and at that time the plaintiff had not paid the promissory notes; and that it was not a case of mutual credit within the principle on which
 [*571] cross demands were allowed to be set off one against the other.

The cases adverted to in the judgment, and *Whitaker v. Rush*,^(a) *Bishop v. Church*,^(b) *Antrobus v. Davidson*,^(c) *Cherry v. Boulton*,^(d) *Clark v. Cort*,^(e) *Rawson v. Samuel*,^(f) and *Dodd v. Lydall*,^(g) were cited.

July 24th.—VICE-CHANCELLOR:—If in this case Richard Reed and not John Reed had been the obligee in the bond of September, 1834, of which the plaintiff was the obligor; and if Richard Reed had been bankrupt; I should have had no dif-

(a) Amb. 407.

(b) 3 Atk. 691.

(c) 3 Mer. 569.

(d) 4 Myl. & Cr. 442.

(e) Cr. & Ph. 154.

(f) Cr. & Ph. 161.

(g) 1 Hare, 333.

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difficulty in deciding this case. But owing to the circumstance that Richard Reed was an insolvent debtor and not a bankrupt, it was admitted by the plaintiff, that he could not succeed in his suit unless he could do so upon some general equity of the court, independently of the statutes which govern the rights of parties in cases of insolvency. It was, moreover, admitted, that the plaintiff had to overcome a further difficulty, arising from this—that the defendant is proceeding upon the bond, not as assignee of Richard Reed, but as administrator of John Reed.

Assuming Richard Reed to have been obligee in the bond, it is impossible to doubt that, before and at the time of his insolvency, he had the equity which he claims in this suit.

As surety, he had a right at any moment to *pay off the [*572] debts which he had guaranteed; and, as debtor upon the bond, he would have a right to say he had paid off the debts out of the money he owed upon the bond. The only question is, whether that equity was superseded by the insolvency, or whether it overrode the rights of the creditors interested under the insolvency. My opinion is, that it remained notwithstanding the insolvency. The general rule is, that the assignee takes whatever belonged to the insolvent, subject to all equities affecting that property in the hands of the insolvent. He takes what the insolvent could lawfully transfer, and nothing more: *Ex parte Hanson*,^(a) and in cases not dissimilar in principle from this, an equity has been established upon the general principles of the court. Thus, the general equity of a trustee to stop the interest due to a tenant for life, who is indebted to the trust, is clear: *Priddy v. Rose*,^(b) *Jeffs v. Wood*.^(c) And this equity, it has been decided, exists in favor of the trustees, after the bankruptcy of the tenant for life, in the face of the argument, which was urged with great reason, that the estate for life of the bankrupt passed to his assignees, and that the trustees should prove their debt under the commission: *Ex parte Mitford*,^(d) which has been followed in *Ex parte Turpin*, *Re Brown*,^(e); in *Smith*

(a) 12 Ves. 346; 18 Ves. 232.

(b) 3 Mer. 86.

(c) 2 P. Wms. 128.

(d) See the order, 3 Mer. 105.

(e) Mont. 443.

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Smith,^(a) which received great consideration ; and in *Ex parte Shute*,^(b) and other like cases.

In *Hanford v. Moseley*,^(c) the case was this :—In 1825, Robinson sold the plaintiff Hanford some mills and other property ; in October of that year all the purchase money was paid except 232*l.* 11*s.* 11*d.* ; and it was then agreed that the vendor [*573] should remain in possession as *tenant at 50*l.* a-year, and a promissory note was given by Hanford for the 332*l.* 11*s.* 11*d.* In November, 1826, Robinson became bankrupt, and Moseley was appointed his assignee. In Easter Term, 1828, an action was brought upon the note against Hanford. In February, 1829, possession was given to the plaintiff, a large arrear of rent being then due. In March, 1830, the action was tried, and Moseley recovered.^(d) It appears from the case as reported in Barnewell and Cresswell, that the defendant in the action insisted that there was an agreement that the note should not be paid when it became due, but should remain unpaid until possession of the property was delivered. In April, 1830, the bill in *Hanford v. Moseley* was filed, suggesting an agreement that the purchaser should retain the amount of the rent out of the unpaid purchase-money in his hands. The argument at the hearing of the cause was, that the purchaser, having the purchase-money in his hands, and being a creditor for the rent, had a right in equity to consider so much of the money in his hands as being applied by himself to pay the rent which from time to time became due. The case was heard before Lord Chief Baron Lyndhurst, and he was clearly of opinion that that equity existed by the general law of the court, independently of the bankrupt laws ; and accordingly the injunction was granted.

The other cases cited were *James v. Kynnier*,^(e) which arose before the statute of the 46 Geo. 3,^(f) *Ex parte Stephens*,^(g) and *Vulliamy v. Noble*.^(h) I doubt whether the case of *Ex parte Stephens* did not turn upon the particular fraud. If it [*574] were not for the *other question, I should have no hesitation in deciding this case in favor of the plaintiff.

(a) 1 Y. & Coll. 338

(b) Mont. & Bligh. 385.

(c) Not reported.

(d) 10 B. & C. 729.

(e) 5 Ves. 108.

(f) C. 135.

(g) 11 Ves. 24.

(h) 3 Mer. 593.

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The other question is this :—the debt upon the bond was due to John Reed : the debts which the plaintiff paid were the debts of Richard Reed. The sums therefore were due in different rights ; and no rule is better understood than that you cannot set off demands due in different rights ;—the principle being, that one man's money shall not be applied to pay another man's debt. But, in this case, it was said, that, inasmuch as Richard Reed was the sole next of kin, and administrator of John Reed ; and as it appeared by the answer of the defendant, that Richard Reed was entitled beneficially to this very sum of 500*l.* ; the difficulty I have adverted to did not arise.

A very slight variation in the answer from its present shape might have concluded the case, as against the plaintiff, on this motion. But, if the effect of the answer be, that before the 30th of January, 1839, the date of the vesting order, Richard Reed, as administrator and next of kin of John Reed, had become beneficial owner of the bond, there is no technical reason, founded in origin of his claim, why the court should not treat the bond as his, and give the plaintiff the equity he claims.

[His Honor then stated the dates, as above, of the bond—death of John, leaving Richard his sole next of kin,—litigation on the pretended will,—the borrowing of the money by Richard during that interval,—the vesting order,—appointment of the defendant as assignee,—death of Richard,—and the grant of letters of administration de bonis non of John to the defendant.]

*The question is, whether the 500*l.* secured by the bond [*575] was not, in truth, at that time the proper money of Richard Reed. The answer says, that the defendant believes the personal property of John Reed was more than sufficient to pay his debts, &c., and that Richard Reed, as his sole next of kin, did become, at the death of his father, entitled to a clear residue, over and above what was required for the payment of debts, &c., of several thousand pounds : that Richard Reed was, by the disputes as to the validity of the will, kept out of possession of the real and personal estate of his father, and was, in consequence, in embarrassed circumstances, and that he borrowed the money

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which the plaintiff claims: that it was not until January, 1838, that John Reed was found to have died intestate: that he believes the money due upon the bond was part of the net residue of his estate, and that the same became legally and equitably the absolute property of Richard Reed, his son, and that he became entitled to recover the monies due thereon for his own use and benefit. The defendant admits that he accepted the office of assignee, and that thereby the estate and effects of Richard Reed became vested in him, and, among other things, the equitable and beneficial ownership in the bond; but whether or not subject to the alleged equities, he submits to the judgment of the court. The defendant then says, that, upon the death of Richard Reed, as such assignee of his estate and effects, and beneficially the owner of the outstanding personal estate of John Reed, he did, in that capacity, apply for and obtain letters of administration de bonis non of John Reed; and that, having done so, he brought his action for the recovery of the money due upon the bond: he denies that he sometimes pretends that he is entitled to receive and administer it as part of the unadministered assets of John Reed, applicable to the payment of his debts, but he afterwards says, that he believes certain of the debts of John Reed still remain undischarged, and that there are sufficient assets to pay the debts, exclusive of the bond, and he submits that he is not bound to set forth what debts are unpaid.

After the suggestion that the debts of John Reed had not been fully paid, I felt a difficulty in treating the money due upon the bond otherwise than as the assets of John Reed; but the admission in the answer is most distinct,—that the bond itself is part of the beneficial estate of Richard Reed, and that the defendant obtained letters of administration empowering him to recover it, not as part of the estate of John, but as part of the estate of the insolvent. I think that that admission relieves the case of all difficulty with regard to the fact of the debts being due in different rights. The case is the same in principle as where an assent has been given to a legacy whereby the property has passed to the legatee, being himself an executor,—in which case the legacy is separated from the estate of the testator, and becomes the

1844.—Jones v. Mossop.

property of the legatee. This is the unavoidable effect of this answer. The injunction, therefore, must be continued; I cannot give any costs.

*CHAPMAN v. FOWLER.

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1844 :—22nd May.

A relation of the parties entitled to the residue of the estate (if any) obtained an order for opening biddings; but did not become the purchaser of the property on the re-sale. The property was sold at an advance beyond the first price added to the deposit. In the special circumstances of the case, the court allowed the person who opened the biddings his costs.

ON the sale of an estate, under the decree of the court in an administration suit, a person was reported and allowed the purchaser of certain premises, at the price of 280*l*. The father of the residuary legatees obtained an order to open the biddings, paid the costs of the purchaser, and deposited 70*l*. The premises were re-sold, and another person became the purchaser, at the price of 410*l*. The father of the residuary legatees, on whose application the biddings had been opened, presented his petition, praying the return of the deposit, and also, that he might be allowed his costs out of the estate. By his affidavit in support of the application, the petition stated, that he had procured the biddings to be opened, not with the desire or intention of purchasing the property, but because he believed it to have been at first sold considerably under its real value, and was desirous that the testator's estate should not suffer so great a loss; and that he so acted with the view of benefiting the estate of the testator. It was stated at the bar that the estate was insolvent.

Mr. *Willcock* for the petition. The question in such cases was, whether the biddings were opened by a party for the purpose of enabling himself to become a purchaser, or whether they were opened solely for the benefit of the estate. *Rigby v.*

 1844.—Chapman v. Fowler.

M'Namara,^(a) and *Earl of Macclesfield v. Blake*,^(b) were cases of the former class; and *Owen v. Foulks*,^(c) and *West v. Vincent*,^(d) of the latter.

[*578] Mr. *Teed* and Mr. *Paton*, for the parties in the cause; did not oppose the application.

The VICE-CHANCELLOR observed, that, if the estate was insolvent, the residuary legatees had, in fact, no interest in the question; but ultimately made the order for the payment of the costs of the petitioner.

BENNETT v. GLOSSOP.

1844:—3rd July.

Bill of discovery in aid of an ejectment by a plaintiff, claiming as heir-at-law against the devisees of a feme covert, alleging the absence of any power of appointment in such feme covert, or that it was never duly exercised by her. The only issue raised on the pleadings being on the validity of the appointment by the devise, the plaintiff was held not to be entitled to the production of the deeds, under which the defendants alleged, that the power of appointment was given to their devisor, although it appeared, that, by such deeds, the estate was limited to her heirs and assigns, in default of appointment.

THE plaintiff claimed to be entitled to certain¹ real estates as the heir-at-law of Mary Shepherd, who was the heiress-at-law of John Carrington the younger, who was the heir-at-law of John Carrington the elder; and the bill was for discovery, in aid of an action of ejectment, which the plaintiff alleged that he was about to commence against the defendants, who, under the will of Mary Shepherd, were devisees of the estates in question, in trust for sale; but which devise the plaintiff alleged was invalid, either because Mary Shepherd had no power to appoint or de-

(a) 6 Ves. 466.

(b) 8 Ves. 214.

(c) 9 Ves. 348.

(d) 12 Ves. 6.

1844.—Bennett v. Glossop.

visé the estates, or, if she had, that such devise was not a due exercise of that power.

The answer stated, that certain lands therein mentioned had descended from Carrington the elder to Carrington the younger, and from Carrington the younger to Mary Shepherd : that, by an indenture, dated in September, 1804, George Shepherd, and the said Mary his wife, covenanted to levy a fine *sur convenance de droit come ceo, &c.*, of the hereditaments [*579] which had so descended to her, and that it was thereby declared that such fine should enure to such uses as George Shepherd should, by deed or will, appoint : that a fine with proclamations was accordingly levied, and, subsequently, several parts of the property were sold and conveyed by George Shepherd : that, by indenture of lease and release, dated in September, 1836, George Shepherd limited and appointed certain of the said hereditaments unto the defendants, their heirs and assigns, upon trust to stand seised thereof to such uses and for such purposes as the said Mary Shepherd should, by deed or will, appoint ; and, in default of such appointment, to the use of Mary Shepherd, her heirs and assigns, for ever : that, in February, 1837, Mary Shepherd duly appointed and devised the said hereditaments to the defendants : that, in 1842, she died, and that the plaintiff was her heir-at-law.

The plaintiff moved for the production of the documents, and especially the indentures of September, 1804, and September, 1836.

Mr. *Bird*, for the motion, submitted, that the plaintiff was entitled to the production of the deeds of 1804 and 1836 ; they were deeds under which, according to the defendants' admission, the plaintiff would take as heir-at-law of Mary Shepherd, in default of appointment : they, therefore, formed part of the common title of the plaintiff and the defendants. Both parties claimed to derive title under those deeds. In the instruments prior to the will of Mary Shepherd, and by which the estate was vested in her, and her heirs or appointees, both parties were equally interested, at least, for the purpose of the trial ; and the plaintiff

1844.—Bennett v. Glossop.

was entitled to inspect them: *Collins v. Gresley*.^(a)
[*580] The deeds of 1804 and 1836, *moreover, formed a necessary part of the evidence of the plaintiff in the ejectment, as showing the seisin of the ancestor under whom he claimed.

Mr. *Elmsley*, for the defendants, was not heard.

VICE-CHANCELLOR :—According to the case made by the bill and answer, there appears to be no issue raised on the fact of the seisin of Mary Shepherd. The issue turns on the validity of the devise by her will. I do not say, that,—if it appeared that the heir-at-law would be unable to make out his title in ejectment, without the aid of an instrument, under which the defendant also claimed, by reason that the freehold was in a married woman at the time of her death, or for any other reason,—he might not be entitled to a discovery of that instrument. But no case of that kind is made upon the pleadings. The deeds, a production of which is asked, are, upon these pleadings, the evidences of the defendant's case only. According to the case upon the pleadings, the plaintiff wants discovery only to prove his heirship in the ejectment, and the onus will then be thrown upon the defendant to prove the case he makes by his answer.

It has been argued, that the plaintiff is entitled to the production of the deeds anterior to the will, as being a part of the common title of both parties. But this might always be urged, with as much reason as in the present case, by every heir-at-law, who is ousted by a devisee or an alleged devisee. Down to the will, the title-deeds of the devisor commonly tend to establish his title; and, therefore, if the devise be set aside, they must tend to establish the title of the heir-at-law of the devisor.

[*581] *But that has never been held, in this court, to be a ground to entitle the heir-at-law to a production of all the title-deeds relating to the estate he claims, until he has made out that his heirship gives him an interest in the estate. The

(a) 2 Y. & J. 491.

1844.—Bennett v. Glossop.

question upon this motion is, what documents may assist the heir in proving his heirship. If the case of *Collins v. Gresley*, which has been cited, be considered as deciding, that, where parties claim adversely, but under a common title to a certain point, either of the parties is entitled to inspect the deeds in the possession of the other, of a date prior to the time at which they become hostile, it certainly is not in accordance with the practice in this court.

Motion refused.

SIMMONS v. LEONARD.

1844: 2nd and 8th July.

Articles of partnership provided, that, on the 31st of December in every year, or such other day as all the partners should agree upon, a general partnership account and rest, and a valuation and appraisement of the property and stock should be made, and signed by the partners, and, on the expiration of the partnership term, the partnership property should be realized and divided on the footing of such last annual rest; and, if any partner should die during the partnership term, his representatives should receive payment of his share of the capital and stock, as ascertained at the last annual rest, with interest thereon, (in lieu of profits from that time,) by instalments; and such representatives to have no right to look into the partnership books. The partnership continued for several years, but the partners did not make the annual account and rest as provided by the articles. One partner died:—*Held*, that the representatives of the deceased partner were not entitled to a sale of the partnership property, as upon a dissolution; that the rest, and not the day of the rest, was the essence of the partnership contract; and, therefore, that the representatives of the deceased partner were entitled to participate in the profits up to the time of his death; and, also, to have the account taken, by means of the partnership books, in the usual way.

JONES, Leonard, Jordan, and Thacker carried on business, in partnership, as manufacturers of soda, and other chemicals, under articles of co-partnership, dated in March, 1841. The articles provided:—1. That the partnership should be for a term of fourteen years, from the 30th of September, 1838, if all the parties should so long live. 4. The capital to be 14,000*l.*; Leonard to bring in 7000*l.*, Jones 2000*l.*, Jordan 2000*l.*, and *Thacker 3000*l.* 5. The parties to be entitled and in- [*582]

1844.—Simmons v. Leonard.

terested in the buildings, lands, hereditaments, and premises, stock, utensils, of trade, goods, and effects of the partnership, as follows : Jones three-tenths, Leonard three-tenths, Jordan two-tenths, and Thacker two-tenths. Interest to be paid to every partner on the capital credited to him in the partnership books, at the last annual rest or statement of accounts taken or made, as thereafter mentioned^{*}; and the clear profits to be divided in the proportions of their said several interests. 9. All debts and duties which should be owing by reason or on account of the joint trade, any loss or damage which should happen thereto, to be paid or borne by or out of the gains or profits of the joint trade, if the same should be sufficient; and, if not, the deficiency to be borne or paid by the partners, respectively, out of their private estates, in the same proportions as the partners are thereinbefore declared to be interested in the profits, to the end that the capital stock of the partnership might not be impaired or diminished by such losses, charges, damages, and expenses. 13. Monthly meetings of the partners to be held, and business of importance then decided upon by the majority of the partners then present, provided such decision be not at variance with the true intent of the articles. 19. On the 31st of December then next, and every succeeding 31st of December in every year during the continuation of the partnership, or on such other day in any partnership year as should be most convenient, and agreed upon by all the partners, a general statement of account and rest, in writing, to be made and taken by the partners of all such goods and merchandizes as should have been sold in the business, and of all stock, moneys, debts, and other things belonging to the partnership, and of all such debts as should be due or owing from or by the partnership, and of all such [*583] other matters *as are usually comprehended in annual accounts of the same nature taken by soda manufacturers and traders; and a just valuation and appraisement to be made by the partners, of all the particulars included in such account, which might be appraised, and the said general account or rest, valuation or appraisement, from time to time, to be written in books kept for that purpose, and signed and subscribed in

1844—Simmons v. Leonard.

each of such books by each of the partners, within one month after the time appointed for the taking thereof respectively ; and, after such signing and subscribing, each of the partners to take one of the books into his custody, and to be bound and concluded by every such account, respectively, unless some manifest error should be found therein and signified by either or any of the partners to the others, or other of them, within one year from the date of such account, in which case such error to be rectified ; and on the making up of every such yearly account, an ample and proper amount to be written off to the debit of trade or profit and loss, for wear and tear, and depreciation of the partnership premises, buildings, fixtures, utensils, implements, engines, and the entire plant of the co partnership trade, and also for all bad debts and discounts, so that the accounts of the partners respectively, and the general statement of the trade of the co-partnership, might exhibit as nearly as possible the true state thereof at the time of such annual rest ; and that, on the making up of every such yearly account, the interest on the capital, respectively, of the parties to the articles in the co-partnership trade, to be passed to the credit of the said parties respectively, and charged to the trade or profit and loss account of the co-partnership ; and the amounts respectively at the credit of the said parties, after charging them with all moneys received by them out of the trade during the past year, and giving them credit for the profit, or charging them with the *loss, [*584] as the case might be, in the trade, in the proportions respectively thereinbefore expressed, to be taken to be the capital of such partners respectively in the co-partnership trade. 20. No partner to draw any sum from the co-partnership trade until he should have paid his stipulated share of capital ; nor then, nor at any time, a larger sum than the interest on his capital, until after a profit shall have been declared, and the capital then employed in the co-partnership trade (independently of the amounts accruing to the partners respectively from the profits of the trade or from the interest on their capital as aforesaid) found to be fully sufficient for the proper carrying on of the same trade ; but, in any year after a profit shall have been declared at the last preceding annual rest as aforesaid, and the capital then em-

1844.—*Simmons v. Leonard*.

plied (independently as aforesaid) found sufficient, each partner, whose stipulated amount of capital should be standing to his credit in the partnership books, to be at liberty to draw out any sum or sums not exceeding, in the whole, the amount, then placed to his credit on the partnership books, for interest and share of profit ; but, if, at any time, it should appear to any three of the said partners that additional capital would be required, either for the proper carrying on of the said trade, or for the purpose of increasing the same, and extending the works or manufactory thereof, then, and in all such cases, neither of the said partners to draw out any portion of the said profits, but each of them, if need so appear, to advance his proportionate share of the additional capital required ; and any partner who should bring into the co-partnership trade, for the purpose of better carrying on the same, either temporarily, at the request of the cashier thereof, or for any period, with the consent of the other three partners, any sum or sums of money above his stipulated share of capital, to be allowed interest thereon at 5*l.* per [*585] cent. per annum *from the time of such advance up to the time of paying off the same. 21. Within six months after the expiration of the term of fourteen years, a general account to be taken, between the present or any surviving or continuing partners, of the stock, moneys, and effects in the trade, or belonging to the partnership, and of the debts of the partnership ; and the stock and goods, and the buildings, lands, erections, fixtures, utensils, and the entire plant of the co-partnership, and all other effects belonging thereto, to be sold and disposed of in such manner as the partners for the time being should think best adapted to their respective benefit ; and the capital of the several partners to be then paid out, and the then debts discharged, and the residue of the effects collected or realized, and the produce divided between the parties to the articles, in proportion to their respective shares in the partnership, as found and declared at the then last annual rest, subject to the said subsequent charges or credits to the partners respectively, from the last annual rest up to the time of such division. 22. If either of the partners should die before the expiration of the partnership, the executors, administrators, or assigns of such de-

1844.—*Simmons v. Leonard*.

ceased partner to receive from the surviving partner, or partners, interest at 5*l.* per cent. per annum, from the capital sum or stock of the deceased partner, as ascertained and declared, in manner aforesaid, at the then last annual rest, subject to the subsequent charges or credits to such deceased partner, from such last annual rest to the time of his decease. The interest to be computed from the day of taking such last annual rest as aforesaid, in lieu of any profits that might have accrued since such time, to the time of his decease; and such capital, and the interest thereon, to be paid by instalments, consisting each of one-third of the amount thereof, with interest thereon respectively, at two, three, and four years from the day of the death of such partner as *aforesaid, in full of such deceased partner's [*586] right and property in the joint stock or capital, gains, profits, and effects; and the executors or administrators of such deceased partner to have no right to look into the partnership books.

The articles of March, 1841, were not under seal, but an engrossment of articles of partnership, to the same effect, was afterwards prepared, by the instructions of the partners, for the purpose of being formally executed by them. The engrossment was dated the 1st of January, 1842.

The partnership business was carried on by the said partners, until the death of Thacker, on the 30th of October, 1842; but no general statement of account, or rest, was made by the partners, according to the provision in the 19th article, either on the 31st of December, 1841, or on any other day prior to the death of Thacker. On the 31st of December, 1842, Jones, Leonard, and Jordan, the surviving partners, made up and settled the partnership account between them, and, according to that account, the share and interest of Thacker, at the time of his death, amounted to 1126*l.* 12*s.* 2*d.* Jones retired from the partnership in March, 1843.

The plaintiffs, the administrators of the estate of Thacker, with his will annexed, filed their bill against Leonard and Jordan, for an account and payment of what was due to Thacker, at the time of his death, for his share and interest in the partnership.

1844.—*Simmons v. Leonard*.

Mr. *Walker* and Mr. *Elmsley*, for the plaintiffs, contend-
[*587] ed, that the performance of the 22d article of *partnership being impossible, owing to the partners having tacitly departed from the provisions of the articles by taking no account, and making no rest, whereby their respective shares had been ascertained in the lifetime of Thacker, the 22d clause had ceased to have any operation, and the partners were left to their ordinary rights: namely, to the right of having the partnership property ascertained and realized by sale. The administrator's of Thacker's estate could not have the benefit of the knowledge and vigilance which their testator himself would have possessed and exercised, if he had been living when the partnership property came to be appraised. The appraisement of the property, instead of being now made (as it would have been under the circumstances which the articles contemplated) for the joint benefit of all the partners, and in which none of them would be interested either to enhance or depreciate its value, would have to be made for a purpose that would render it the interest of the survivors to lower the valuation, and thereby to lessen the amount they will be required to pay out; and while they have this adverse interest, they would also have the advantage of conducting that valuation, with all the knowledge which their situation gives them, against strangers, imperfectly, if at all, acquainted with the circumstances of the property, of which, as representatives, they claimed a share.

Mr. *Romilly* and Mr. *Giffard*, for the defendants, resisted the application for a sale of the partnership property; and insisted, that the plaintiffs were not entitled to examine the books of the firm; but that the true effect of the 22d clause was to bind the estate of a deceased partner, by arresting his interest as a partner in the concern on the 31st of December preceding his death, giving him interest on his capital from that time;
[*588] *or, if his right of participation as a partner continued to the time of his death, that the effect of the clause, in either case, was to bind his estate by the annual account taken at the proper time by the existing partners, whether before or after the death of the deceased partner.

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VICE-CHANCELLOR :—It will be sufficiently accurate for the present purpose, to state this case as a bill by the executors of a deceased partner against the survivors, for an account ; omitting the interest which Jones, a former partner, originally had in the concern. The partnership was for a term of fourteen years, which was unexpired when Thacker died ; and the questions argued before me were two : First—whether the partnership is to be considered as wholly dissolved by Thacker's death, and to be wound up in the usual way, by selling the partnership property, paying the debts, and dividing the partnership assets between the survivors and the estate of the deceased partner ; or, whether the amount due to Thacker's estate is to be paid out to his estate by instalments ? Secondly—whether, according to the true construction of the partnership articles, applied to the events which have happened, the accounts are to be taken down to the death of Thacker, or down to the “rest” day, or day fixed for the “statement of account,” or “annual rest,” preceding the day of his death ?

I have taken the questions in the above order, because, whatever may be the right with regard to the second question, I certainly entertain no doubt as to the first. For the [*589] purpose of answering both these questions, it appears to me wholly immaterial which set of articles I refer to in explaining my views of the case ; and I shall refer to the second articles, dated the 1st of January, 1842, only as being more full and detailed, and best considered in point of expression.

[His Honor then mentioned the shares of the partners, and the terms of the articles, as above stated ; and also mentioned the fact, that the partnership was carried on by the four until the 30th October, 1842, when Thacker died.]

If a rest had been made on the 31st of December, 1841, according to the partnership articles, no question would have arisen ; but it has been stated by the plaintiff, and is admitted, that no rest was made, and that the executors of Thacker must, therefore, for some purposes, have a right to see the accounts taken, and to

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overhaul the partnership books, notwithstanding the partnership articles.

The plaintiff says, in one branch of his argument, with reference to the first question, that, if the benefit of the rest cannot be had, the 22d clause is inoperative altogether; that the proviso for paying out the share of the deceased partner, as ascertained at the last annual rest, by instalments, cannot be applied; and that the ordinary rule of a sale and immediate division must apply. This is a point upon which I am not aware that any decision has ever been pronounced. The rule which justice and common sense would apply in such a case is, I think, too clear for serious argument; the proviso for sale in one event, that of the term running out, and the proviso for paying out a deceased partner's share (dying during the term) by instalments, [*590] is conclusive evidence of an intention and agreement, that the death of a partner during the term should not work a dissolution of the whole partnership, but that the survivors should have a right to carry it on, with the accommodation of paying off the executors of the deceased partner by instalments.

Then, is there any rule of law so stringent as to oblige me to decree a sale in the circumstances of this case? I think not. Nothing has prevented the application of the strict terms of the articles, except the waiver by all parties, *pro hac vice* at least, of one particular part of the 22d clause. But it would be extravagant to hold, that the mutual omission of the parties, whether from neglect or any other cause, to act upon this part of the clause, should have the effect of altering the partnership contract on a point so material as that of stopping or not stopping the whole concern, if a partner died. The inconvenience which results from the omission will be the same, whether the partnership is wholly dissolved or not.

I have come to this conclusion partly on the general grounds I have mentioned, and partly by considering what the law would have been in the case of a partner dying before the first rest-day after the commencement of the partnership; and I think that would not have entitled the executors of the deceased partner to

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require a sale, although the accounts must have been taken from the beginning.

The second question is, to what time the accounts are to be carried. Upon this part of the case, as in the former, I entertain no doubt of what ought to be done, if it be not excluded by a positive contract between the parties. Thacker, the deceased partner, was a party to all the transactions of the business which took place in his lifetime, and he should [*591] therefore share the benefit, or bear his proportion of the loss, according to the result of the accounts down to his death, of which result I know nothing. The question then is, whether any contract which I have power to enforce requires me to stop the account at an earlier day.

In order to simplify the case, I will suppose that the amount payable to Thacker's estate (however ascertained) is to be paid immediately, and not by instalments. If the articles had fixed a rest-day, and had provided that the accounts should, as between the partnership and the estate of a deceased partner, be made up to that day, with the other provisions for taking the accounts, and paying out the balance in the manner provided by the articles in this case, there would have been no ground for the question which I am now considering. But that is not the purpose expressed in the articles. The purpose was not to limit the account to any particular time, (nor do the articles in fact so limit the account,) but to prevent a sale and dissolution of the whole concern, and to ensure to the survivors the benefit of an account settled by the deceased partner, who was conusant of his rights, and to avoid disputes with his executors, who would be ignorant of his rights, as well as the inconvenience, expressly noticed, of exposing partnership books to the inspection of strangers. These beneficial and important ends have been lost to the partnership, not, perhaps, from any deliberate intention to abandon, once and for all, the 22nd clause, but because the parties have not, since the commencement of the new partnership, in March, 1841, acted upon the clause. But, whether the clause was abandoned in toto, or abandoned pro hac vice only, appears to me immaterial for the present purpose. There is not, in fact, a rest upon which I can act; and

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if, according to the true construction *of the articles, the [*592] rest itself, and not the day of the rest, is the essence of the 22nd clause, and if, as a consequence of the neglect of the parties so to act as to secure to themselves the benefit of that clause, the accounts must be taken, and the executors of the deceased partner must have a right to look into the books, and investigate the accounts of the concern, the question is, whether I shall more nearly approximate to the specific performance of the articles, by taking the accounts down to one period, rather than another.

I have certainly inclined very much to stop the accounts in December, 1841, because that would have been, in appearance, the nearest approximation I could make to the actual contract of the parties. But I cannot, with reference to the language of the articles, which makes the annual rest itself, and not the day of the rest, the essential part of the clause, find a reason for stopping at one period rather than at another, prior to the death of Thacker. The contract embraced two special clauses: first, it provided that the death of a partner should not work a dissolution, and that his should be paid out by instalments; and, secondly, it established a conventional mode of taking the account, for the purpose of ascertaining the amount of the share which was to be so paid out. The first branch of these provisions may, and, I am of opinion, must, operate; the second branch fails, and leaves the account to be taken in the usual way, down to the death of the deceased partner.

1844.—Cory v. The Yarmouth and Norwich Railway Company.

***CORY v. THE YARMOUTH AND NORWICH RAILWAY [*593]
COMPANY.**

1844: May 30th and 31st; June 1st, 6th, 7th, 11th, 27th, and 28th.

The owner of a ferry obtained an act of Parliament enabling him to build a bridge instead of the ferry, and to take tolls thereon; and enacting, that any person who should evade the payment of the tolls by conveying, or assisting to convey, passengers, &c. across the river, within the limits of the ferry, otherwise than by the bridge, should forfeit and pay 40s. for every such offence, to be recovered in a summary way before a justice of the peace, and levied under a warrant to be issued by such justice; and that one moiety of such penalty should be paid to the informer and the other to the owner of the bridge; and that, where no sufficient distress was found, the offender might be committed for non-payment of such penalty; and that any party aggrieved might appeal from any order of a justice, under the act, to the quarter sessions, but no order or proceedings in the execution of the act should be removed by certiorari or any other suit or process to any court of record at Westminster. On a motion to restrain a railway company, whose terminus was within the limits of the ferry, from conveying railway passengers across the river in steam-boats—*Held*, that, although the act which substituted the bridge for the ferry gave the owner of the bridge no right of action against persons evading the tolls, yet, if he were entitled to recover penalties against offenders under the act, *de die in diem*, the court would protect him by injunction from the infringement of his right.

That as no action could be brought, under the act, by the plaintiff against the railway company, in respect of the alleged wrong, the court would not simply leave the plaintiff to proceed by distress, in order that his legal right might be tried in replevin, but would direct an issue to try such right, and require the defendants not to raise any objection at law on the ground that the alleged wrong was done by a corporation.

That, where the opinion of the court was not clearly for or against the plaintiff, it would be governed by the balance of inconvenience on either side in granting or refusing the injunction; and where the damage to the plaintiff was shown to be small in amount, the Court would not prejudice the legal question by granting the injunction, but would require an account to be kept pending the trial at law.

ROBERT CORY, being seized in fee-simple of certain lands, part of a farm called the Ferry-farm, in the parish of Runham, in the county of Norfolk, on the west side of the river Bure, which separates the Ferry-farm from the parish of Great Yarmouth, and being or claiming to be seized of an ancient ferry for passengers, horses, carriages, and cattle, over the river Bure, from Great Yarmouth to the Ferry-farm, applied for and obtain-

1844.—*Courtenay v. Williams*.

ed an act of Parliament,^(a) which, after reciting his title to the ferry, and that it would be of public advantage if a bridge was erected across the Bure, in lieu of the ferry, from the Ferry-farm to North Quay, in Great Yarmouth, and that Robert [594] Cory was willing, at his own *expense, to erect such bridge, empowered Robert Cory, his heirs and assigns, to build and maintain the said bridge, and prescribed the toll to be taken by Robert Cory, or the owner or owners, proprietor or proprietors, for the time being, for all passengers, beasts, and carriages passing over the same, and vested the said tolls in Robert Cory, his heirs and assigns. It was thereby also enacted, that, if any person subject to the payment of any of the said tolls should, after demand thereof made by any collector or any other person to be appointed to receive the same, neglect or refuse to pay the same, it should be lawful for such collector or person in his own person, or taking such assistance as he should think necessary, to stop and prevent the passage of any person so neglecting or refusing as aforesaid, or of the beast, cattle, or carriage for or in respect of which the said tolls ought to be paid, until full payment thereof, or to seize and distrain any horse or other beast or cattle, together with their bridles, saddles, gears, (except the bridle or rein by which such horse or other beast or cattle should be guided or restrained,) harness, or accoutrement, or any carriage drawn by any such horse or other beast or cattle; and if such tolls and the reasonable charges of such seizure should not be paid within the space of three days after such seizure made, the collector or person so seizing should and might sell the horse, or other beast or cattle, carriage or thing, so seized, or any part thereof, returning the overplus, (if any,) and so much of such carriage or thing as should remain unsold, upon demand, to the owner thereof, after such tolls and all reasonable charges occasioned by such seizure and sale should be deducted. And it was further enacted, that, in case any dispute should arise respecting the demanding or taking, or the payment of any toll, or account of any toll due, or the charges of keeping

(a) 7 & 8 Geo. 4, intituled, "an act for erecting a bridge over the river Bure from Runham to Great Yarmouth, in the County of Norfolk."

1844.—Cory v. The Yarmouth and Norwich Railway Company.

or selling any distress, it should be *lawful for the per- [*595]
son distraining to retain such distress, or the money
arising from the sale thereof, (as the case might be,) until the
amount of the toll due, and the charges of keeping and selling
the distress, and all matters in dispute should be heard and de-
termined by some justice of the peace for the county of Norfolk
or the borough of Great Yarmouth, within their respective juris-
dictions, who, upon application made to him for that purpose,
should examine the matter upon oath of the parties or other wit-
nesses, (which oath every such justice was thereby empowered
to administer,) and should determine the amount of the toll and
charges due and other matters in dispute between the parties,
and might also award such costs, to be paid by either party to
the other, as to such justice should seem just and reasonable ;
all which costs, in case the same should not be forthwith paid,
should and might be levied and recovered by distress and sale
of the goods and chattels of the person or persons so awarded to
pay the same, by warrant under the hand and seal of such jus-
tice, (which warrant every such justice was thereby empowered
to issue,) and the overplus, (if any,) after payment of such costs,
and the costs of such distress or sale, should be returned, upon
demand, to the person or persons whose goods and chattels
should have been so distrained and sold. The act, after provi-
ding, among other things, that the bridge should be a public
bridge upon payment of the said tolls, but that it should not be
adjudged to be a county bridge, provided, that, after the said
bridge should have been completed, if any person should in any
manner convey any person, beast, or cattle, or any cart or car-
riage whatsoever, across the said river Bure, within the limits
of the present ferry, otherwise than over the said bridge, or
should be in anywise aiding or assisting therein, in order or
with an intent to evade, or by means whereof should be
evaded, the payment of any toll thereby granted, *every [*596]
person so offending should forfeit and pay any sum, not
exceeding forty shillings, for every such offence ; and that all
fines, penalties, and forfeitures inflicted or imposed thereby (the
manner of levying and recovering whereof was not thereby par-
ticularly directed) might, in case of non-payment thereof, be re-

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covered in a summary way by the order and adjudication of the said justice or justices of the peace, within their respective jurisdictions, on complaint to him or them for that purpose exhibited, and afterwards be levied, as well as the costs of such proceedings, on non-payment, by distress and sale of the goods and chattels of the offender or respective offenders, or person or persons liable to pay the same, by warrant, (as provided by sect. 6) ;(a) “and that one moiety of the penalties and forfeitures, when recovered, shall be paid to the informer, and the other moiety shall be paid to the said Robert Cory, or to the owner or owners, proprietor or proprietors, of the said bridge for the time being.” The act went on to provide, that, in case such penalties and forfeitures should not be paid, and could not be recovered by distress, the justice or justices might commit the offender or offenders to the common jail for any time not exceeding three months ; and the act also empowered the justices to proceed by summons against offenders under the act, and it set forth the form of conviction. The act then provided, that, if any person or persons should think himself, herself, or themselves aggrieved by any order, judgment, or determination of any justice or justices relating to this act, or any matter or thing therein mentioned, such person or persons might appeal to the justices of the peace at the next general or quarter sessions to be holden for the county, borough, or place wherein the cause of appeal shall have [*597] arisen ; and the said justices were thereby *authorized and required to take cognizance thereof, and to hear and determine such complaint or complaints at such or the next general or quarter sessions to be holden for such county, borough, or place, and, if they should see cause, mitigate, at their discretion, all or any of the penalties or forfeitures laid upon or incurred by the party or parties complaining, or vacate or set aside the conviction or convictions, and set the parties at liberty, or otherwise ratify or confirm the same, with such costs as to them in their discretion should seem reasonable. And that no proceedings to be had touching the conviction of any offender or offenders against the act, or any order made, or any other matter or

(a) Ante, p. 594.

1844.—Cory v. The Yarmouth and Norwich Railway Company.

thing to be done or transacted in, or relating to, the execution thereof, should be vacated or quashed for want of form only, or be removed or removable by certiorari, or any other writ or process whatsoever, into any of his majesty's courts of record at Westminster, any law or statute to the contrary notwithstanding. And it was finally provided, that the act should be deemed and taken to be a public act, and should be judicially taken notice of as such by all judges, justices, and others.

After the passing of the act, Robert Cory erected a suspension-bridge, which was opened for public use in 1829. The plaintiff was the son and devisee of the real estate of Robert Cory.

The defendants were, in 1842, incorporated by act of parliament, and empowered to make a railway in the line and manner therein described, from Great Yarmouth to the city of Norwich. The act enabled the defendants to take part of the Ferry-farm for their station; but it was also provided, that they should not erect, or procure to be erected, any bridge over the river Bure, without the consent of the owner or owners *for the time being of the said suspension bridge; and [*598] that nothing therein contained should prejudice or affect the right or title of the plaintiff to the suspension-bridge, or the ferry, or the tolls payable in respect thereof.

The railway was opened on the 1st of May, 1844. On the 4th of May the defendants commenced carrying in steam-boats the passengers, horses, cattle, carriages, and goods arriving or proceeding by the railway, to and from their station in the Ferry-farm, by means of a canal communicating with the river Bure, across that river from and to Buck Quay, in Great Yarmouth. The plaintiff thereupon filed his bill, and moved for an injunction to restrain the defendant from conveying any passengers, carriages, horses, or cattle, in any steamboat or other boat, between the Ferry-farm and Great Yarmouth, either from the railway station to the Buck Quay, or any other part of Great Yarmouth, or from the railway station to South Town, or from Great Yarmouth or South Town to the railway station, and from permitting any person, carriage, horses, or cattle to be conveyed as aforesaid in any boat or boats, to or from, or to land and embark on or from, the property of the defendants, and from otherwise

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evading the payment of toll to the plaintiff in respect of his bridge and ferry respectively, or interfering with the exclusive right of ferry vested in him.

The affidavits raised several questions of fact: whether the plaintiff had any right to the ferry, and, if so, whether the passage by the boats of the defendants was within the limits of the ferry; whether, if wholly or in part without the limits of the ferry, the place of passage by the boats of the defendants was not so near to the ferry as to be an evasion or constructive breach of the plaintiff's right. And a question of law was also [*599] raised, whether, if the plaintiff had any right of ferry before the passing of the bridge act, that act had not the effect of taking away or superseding the ferry.

Mr. *Tinney*, Mr. *Wood*, and Mr. *Hall*, for the motion.

Mr. *Russell*, Mr. *Romilly*, and Mr. *Borrett*, for the railway company.

The cases referred to were.—*Anon.*(a) *Anon.*(b) *Tripp v. Frank*,(c) *Huzzey v. Field*,(d) *Farrow v. Vansittart*,(e) *Bell v. Hull and Selby Railway Company*,(f) *Harmer v. Plane*,(g) *Pim v. Curell*,(h) *Bramwell v. Halcomb*,(i) *Bacon v. Jones*,(k) *Barnard v. Wallis*,(l) and 20 Vin. Abr., tit. "Toll," 289.

On the effect of an act conferring private rights, although declared to be a public act, the following authorities were mentioned:—*The Prince's case*,(m) *Perchard v. Heywood*,(n) *Hesse v. Stevenson*,(o) *Perry v. Skinner*,(p) and 19 Vin. Abr., tit. "Statute," (D.,) pl. 5, p. 500.

VICE-CHANCELLOR, after stating the rights claimed by the plaintiff, and the alleged infringement thereof by the defendants:—

(a) 1 Ves. 476.

(d) 2 C., M. & R. 432.

(g) 14 Ves. 130.

(k) 4 Myl. & Cr. 436.

(n) 8 T. R. 468.

(b) 2 Ves. 414.

(e) 1 Railway Cases, 602.

(h) 6 Mee. & W. 234.

(l) Cr. & Ph. 85.

(o) 3 Bos. & Pul. 565.

(c) 4 T. R. 666.

(f) Id. 616.

(i) 3 Myl. & Cr. 737

(m) 8 Rep. 1.

(p) 2 Mee. & W. 471.

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That this act of the defendants is not within the *express powers conferred upon them as a railway com- [*600] pany, is beyond all dispute; and I think I may add, it never was contemplated by the legislature, that they should have power so to act.

That the defendants do thereby deprive the plaintiff of a great portion of the traffic over his bridge, cannot be doubted; and this is not less the case, because, perhaps, many of the passengers who now pass the bridge, or would pass over the bridge if the steamboats were not used, would not have had occasion to cross the bridge if the railway had not been made. But the plaintiff's right is purely a legal right, and the province of a court of equity in such a case is simply to protect the legal right. It is admitted, that the right must be tried at law; and the only question now is, whether I am to grant the injunction pending that trial, or give the plaintiff liberty to apply again when he shall have established his legal right. This question came repeatedly before Lord Cottenham, and has been the subject of several of his most elaborate judgments. He considered it very much in the case of *Bacon v. Jones*,^(a) and the result of his observations is, that it is always a matter in the discretion of the court. If the court is clearly against the plaintiff, it may refuse the injunction at once, merely giving him leave to proceed at law, (which, pending the suit in equity, he could not do without that leave,) with liberty to apply, if he succeeds at law. But, on the other hand, if the court is clearly with him, the court may, in the exercise of its discretion, grant the injunction in the first instance. Supposing the question of the legal right to be one on which the court is not prepared to express an opinion, the court is generally governed by the consideration of the *convenience or inconvenience on the one side or on [*601] the other. If giving to one party the power of doing the acts complained of would be attended with irreparable or very serious mischief to the other, the injunction is more commonly granted; but if, on the other hand, there be a balance of inconvenience, the court will generally leave the parties in the situa-

(a) 4 Myl. & Cr. 436.

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tion in which they are until the legal right shall have been established.

The most important of the cases referred to in the argument upon the general question in the cause was the case of *Huzzey v. Field*.^(a) In that case, the court, advertng to the very scanty authority upon the subject, gave their judgment with a strong expression of hesitation as to whether they might not have come to an erroneous conclusion. They laid down many general propositions and their opinion was not very consistent with other cases.

In this case, very extreme propositions were argued on both sides. First, the defendants say, that the plaintiff's right is more limited in the bridge than it was in the ferry. They say, secondly, that, whether that be so, or not, the course of the defendant's steamers is wholly out of and beyond the river Bure; that the starting point and the landing point are both without the Bure, and that the steamers never touch the river Bure in the course of their passage. They insist, however, that it is enough for the defendants' purpose that one terminus of the passage of the steamers is out of the Bure; and that nothing can be an infringement of the plaintiff's ferry except a ferry-boat, which start from one bank of the Bure and land the passengers at the other bank of the same river. Now that I call an

[*602] *extreme proposition, because the bridge, which is higher by about fifty yards than the ferry, is not more than two hundred and fifty yards from the mouth of the river; and if the defendants' argument be right, it is competent to any person to establish a ferry almost immediately adjoining the starting point of the plaintiff's ferry; and, provided he landed his passengers one yard out of the river Bure, on the other side, it would be no infringement of the old ferry, although, by offering superior accommodation, they might by possibility draw away the whole of the bridge traffic.

The plaintiff, on the other hand, says, that no person going from the Ferry-farm to any spot on the Bure or on the Yare can fail to infringe his right, if the spot at which the passengers are

(a) 2 C., M., & R. 432.

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landed on the Yare is anywhere in the town of Yarmouth. In fact, he says that no one has the right to convey passengers from any part of the Ferry-farm to Yarmouth except over his bridge; the consequence of which would be, that, if Yarmouth should (as London has done) extend itself for miles towards the haven mouth, no person could embark in the river Bure in a boat, and pass down the Yare, and land at the most extreme southern point, without subjecting himself to the penalties or consequences attending a breach of the plaintiff's right.

There are some important observations upon this subject to be found in *Huzzey v. Field*, where the judges advert to the different sorts of ferries,—some being ferries connecting one town with another, others being ferries connecting one spot on the river with another spot on the river, without reference to towns. I advert to these observations not to express any opinion upon the point, but only to contrast them with the two extreme propositions for which each party must contend *in order [*603] to maintain the case which each has put forward.

Now, when I refer to the act of parliament and the cases, I think I ought not to grant this injunction, nor ought I to refuse it on the ground only that the plaintiff has or has not the legal right which he claims. The question, therefore, comes entirely to that of the relative inconvenience to either party. The case of *Harmer v. Plane*(a) was referred to on this point. I advert to it only for the purpose of observing, that this is not a case like that of a patentee, who, if he were in no case protected until he had established his right at law, might be subjected to the oppression and ruinous necessity of litigating his right with a multitude of persons in order to preserve the benefit of his patent. In this case, no one can say that there is any danger that other persons will set up ferries in consequence of the railway company having undertaken to carry their passengers across the river. There is no reasonable ground to apprehend any injury to the plaintiff in this respect during the short time that must elapse before the trial.

It only, therefore, remains, that I should consider the comparative damage which would probaby result to the plaintiff, if I

(a) 14 Ves. 130.

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refuse the injunction, and to the defendants, if I grant it. I remain of the opinion which I before expressed, that it will be impossible accurately to measure the quantity of damage the plaintiff will sustain, if, in the opinion of a court of law, it shall appear that his right has been infringed; and that such damage cannot be accurately ascertained, is, in many cases, a reason why the court will interfere. But, on the other hand, [*604] the plaintiff's researches have furnished me with *means of approximating very nearly to the damage, for he estimates it, on the affidavits, at three pounds a day. Now, this case may be tried within six weeks or two months; and there is, therefore, no danger of that extreme inconvenience to the parties which would require the interference of the court, if the injury were larger, or if there were no means of ascertaining its amount with tolerable certainty, and there were no damage to be feared on the other side to balance it in the consideration of the court. The plaintiff, it appears, is able to show how many passengers have passed over his bridge, in carriages and other vehicles, and on foot, during the last three years. The defendants also can keep an account of the number of passengers they carry; and although, as is often observed with regard to piratical works,^(a) that account may afford no measure of the damage sustained by the plaintiff, yet it is clear, from the small pecuniary amount at which the plaintiff estimates that damage, there may be an approximation to it, so near as to make the injury not in any sense irreparable.[1] Against the damage to the plaintiff, I have to set off that which I think the very doubtful injury to the defendants, if the injunction should be granted. I cannot think that a single passenger less will go by the railroad because they have to pass over the plaintiff's bridge than would go if they were carried over by the defendants' steam-boat; and even if it might appear that a few persons should be deterred from using the railway in consequence of having to cross the river by the bridge, against that possible loss must be set off the expense of keeping up the steamer. I am not satisfied the defend-

(a) See 2 Hare, 560.

[1] See *Colburn v. Sims*, 2 Hare, 560, for the principle upon which the court gives an account of the profits of an unlawful work, in the case of piracy.

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ants would sustain any injury by the injunction as they would not have to work the steamer during the interval.

*Taking the case, however, to be one where there is [*605] no irreparable mischief, and no extreme damage, which may not afterwards be compensated, I think it ought to go to law unprejudiced, and that it would not do if, where the amount of injury is so small, I should pronounce an opinion in favor of the legal right before the trial at law.

[His Honor then directed that the parties should go to trial at the then next assizes. The terms of the order subsequently made are fully stated in p. 608, *infra*.]

June 27th.—The counsel for the plaintiff submitted to the court, that there was no form of action which the plaintiff could bring. He had no remedy except under the 23d section of the bridge act, which gave a penalty, half of which would, by the 30th section, go to the proprietor of the bridge, and half to the common informer. There was nothing in the act which enabled the plaintiff to bring the question before a jury: the penalty was to be imposed by means of a summary proceeding before a justice of the peace; but that remedy was not only inadequate, but it would not bind the right of any party, as one justice might convict, and another refuse a conviction. Another question of great difficulty was, whether there could be any summary remedy for penalties against a corporation; the corporation was, by its servants, the party who was doing the wrong. If the plaintiff sued for penalties, he could only proceed against the master of the steam-boat. The right of the plaintiff under the act was a newly created right, and not a right at common law; and the court of law could therefore give him no remedy except that which was *given him by the act. Un- [*606] der these circumstances, they submitted, that the plaintiff ought to have an opportunity afforded to him of showing, by means of an issue, what his common-law right was; and if he succeeded in establishing the right which he alleged, that he was entitled to the assistance of the court to maintain it, as in cases of nuisance and other permanent injuries, by a perpetual injunction to restrain the infringement of the right.

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The counsel for the defendants submitted, that the legal title of the plaintiff, if he had any, might be tried by an action ; and the defendants would demur to any declaration which he might frame. If no action would lie, that fact went far to conclude the case against him ; for if he had no remedy, it would, on principle, follow that he had no right ; and the question simply was, whether the plaintiff had or had not any legal right. But if, for the purpose of the application, the court should put the case in a way of trial at law, the question of right, whatever it was, might and ought to be tried in the manner which the act indicated, and in no other manner. The court, if it would remove any merely technical objection in the way of such a trial, would go no further : for example, the court might require the defendants to admit (as they were willing to do) that the plaintiff had obtained a conviction in a penalty before a justice of the peace, and upon that conviction he might destrain ; and the defendants would replevy, undertaking to raise no objection on the ground of their being a corporation. In the action of replevin the whole question would be fairly raised. Wherever there was a right of distress, there was a corresponding right to replevy. The clause which precluded the proceeding by certiorari, or otherwise, before the courts at Westminster applied only to a personal penalty. It did not *prevent replevin ; it did oust the jurisdiction of the superior courts, and compel every subject against whom any informer might succeed in obtaining a warrant of distress to try his right before the justice of the peace, by excluding him from the ordinary courts of justice. Directing an issue on an interlocutory application was a modern practice, confined to cases where the whole dispute depended on some single question, and not to be extended to complicated cases involving several doubtful points : *Fullagar v. Clarke*.(a)

The VICE-CHANCELLOR said, that, with regard to directing an issue upon an interlocutory application, he understood the rule to be clearly laid down by Lord Eldon, that, if the court could plainly see what the issue in the case was, it might properly di-

 (a) 18 Ves. 461.

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rect that issue to be tried, but it would not do so if there was any doubt of what the issue might be. It was true, that, until the answer was put in, the issue was not raised upon the pleadings; but in this case the whole question had been fully brought before the court upon the affidavits, and had been amply discussed, so that the points in dispute were sufficiently and distinctly raised; he therefore saw no objection, either in point of form or substance, to directing an issue. With respect to the remedy given by the act, which, it had been contended, was the measure of the legal right, it appeared to him, that, if it was admitted to be a case in which the plaintiff might recover penalties *de die in diem*, it was a case in which this court would protect his right by injunction. The question of right might be tried by an issue to this effect: whether, in contravention of the act, A. B. (an individual person) had carried passengers from and to the particular points referred to; the defendants admitting, *upon the trial, that they had carried such [*608] passengers at certain times, and that the act of the railway company was the act of A. B.

LET the parties proceed to a trial at law, at the next assizes for the county of Norfolk, by a special jury of the county, on the following issue; viz. whether the Yarmouth and Norwich Railway Company have, in any manner, conveyed any passengers in contravention of the act of Parliament of the 7 & 8 Geo. 4, intituled, &c.(a) And the defendants are to admit, that they did, on the 4th of May, 1844, convey passengers, from the dock or basin cut by the company near or adjoining to the present Yarmouth terminus of the railway, to the Buck Quay in Great Yarmouth, and vice versa, and are not to raise any objection on the ground of their being a corporation, and not an individual, or company of individuals. And, in such issue, the plaintiff here is to be plaintiff at law, and the defendants here, defendants at law, who are forthwith &c. The Master to settle such issue, in case &c. And at the trial, &c., any special matter to be endorsed on the *postea*. Usual direction as to books and papers. And let this motion stand over until after the trial of the issue. And the defendants are, in the meantime, to keep an account of all and every the passengers carriages, horses, and cattle which may be in the meantime conveyed by the defendants, their servants or agents, in any steam-boat or other boat in respect of which the plaintiff is or would be entitled to any payment or toll if the same passengers, carriages, horses, and cattle had respectively passed over the bridge, and, at the plaintiff's request, are to furnish him with a copy of such account before the said trial, to be verified by the affidavit of the secretary of the said company. Liberty to apply.

(a) Ante, p. 593, n.

 1844.—Hinves v. Hinves.

[*609]

*HINVES v. HINVES.

1844:—1st and 3rd May.

Residuary gift of the whole income of the testator's property (which included leaseholds and Long Annuities) to his wife, for her life, at her own disposal, but not to sell without the consent of all parties; remainder to the brothers of the testator equally:—*Held*, that, construing the gift with reference to the other provisions of the will, the widow was entitled to the income of the property for her life, in the state of investment in which it was left by the testator.

Semble, in the application of the rule for converting into permanent investments, at the death of the testator, perishable property in which he has given interests for life, and other interests in succession, the inclination of the court in the later cases, when the meaning was doubtful, has been in favor of that construction which would give to the tenant for life the enjoyment of the property in specie.

THE question arose on the will of W. Hinves, dated in 1814, which was as follows:—"I will and bequeath to my lawful wife Sarah Hinves, and my brother George, and my brother Nathaniel, and John Hill to be my lawful executors to dispose of my property in the manner and form hereinafter mentioned, after all just debts and funeral expenses are paid, viz., to my wife Sarah Hinves, the hole income of my property of all descriptions whatsoever, for her natural life,(a) at her own disposal, but not to sell witt(b) the hole consent of all parties; and at my decease I leave for her own sole benefit, all my household furniture, wearing-apparel, plate, linen, and 500*l.* in lawful money, for her own benefit, to be paid out of my stock and book debts, and the residue of monies out of my book debts, stock, &c., and, if out of business at my decease, she is to have 500*l.* made up, if there should not be good debts or cash in hand at that time; I also leave at her own disposal, at her decease, all monies her brother William Banister be in debt to me at my decease; and the residue of my estates or property whatsoever I leave equally to my five brothers, for their natural lives," (naming them.) "I mean the same benefit to each brother's wife, and if no issue, for the income of

(a) The words "and at her decease" had then followed, but were erased.

(b) Illegible, but resembling either "with" or "without."

 1844.—*Hinves v. Hinves*.

that part of the property to be divided amongst the survivors for their natural lives; but if any *children, then [*610] the benefit or share of the deceased to be equally divided amongst their children born in lawful wedlock; and if any one of them should be dead, the said child's part to be divided amongst his or her children's children if any then living. Legacies to be paid within three months after my decease."

The testator then bequeathed several legacies, and, among others, 100*l.* 3*l.* per cent. Stock, to be "bought in" within three months after the decease of his wife, to the minister of a certain meeting-house, and added, "I also leave to my wife Sarah Hinves all the benefit of the houses in Gravesend at her own disposal after my decease."

The testator died in 1832. The widow died in 1840. The bill was filed by the children of some of the brothers of the testator against the representatives of the widow and the other parties interested. The only point which probably may be applicable to any other case was the question, whether the widow was entitled to the specific enjoyment of the property, consisting in great part of leasehold tenements, and some Long Annuities, during her life, or whether the parties in remainder were entitled to require that it should be sold and converted into a permanent investment in her lifetime.

Mr. *Russell* and Mr. *Goodeve*, for the plaintiffs.

Mr. *Cooper*, Mr. *Kenyon Parker*, Mr. *Teed*, Mr. *Romilly*, Mr. *Bacon*, Mr. *Stinton*, Mr. *Campbell*, Mr. *Willcock*, and Mr. *Whitbread*, for the other parties.

*VICE-CHANCELLOR:—I take the result of the rule [*611] laid down by Lord Eldon in *Howe v. Lord Dartmouth*,^(a) and by Lord Cottenham in *Pickering v. Pickering*,^(b) to be, that, where personal estate is given in terms amounting to a general residuary bequest, to be enjoyed by persons in succession, the interpretation the court puts upon the bequest is, that the

(a) 7 Ves. 138.

(b) 4 Myl. & Cr. 289.

 1844.—*Hinves v. Hinves*.

persons indicated are to enjoy the same thing in succession ; and, in order to effectuate that intention, the court, as a general rule, converts into permanent investments so much of the personalty as is of a wasting or perishable nature at the death of the testator, and also reversionary interests. The rule did not originally ascribe to testators the intention to effect such conversions, except in so far as a testator may be supposed to intend that which the law will do ; but the court, finding the intention of the testator to be that the objects of his bounty shall take successive interests in one and the same thing, converts the property, as the only means of giving effect to that intention.

But, if the will expresses an intention that the property as it existed at the death of the testator shall be enjoyed in specie, although the property be not, in a technical sense, specifically bequeathed, to such a case the rule does not apply. The rule is settled with sufficient clearness ; the difficulty arises only in its application to particular cases, where the intention of the testator is expressed with more or less distinctness. It certainly has always appeared to me, that, in the more modern cases, (unless, perhaps, the decisions of the Vice-Chancellor of England in

Mills v. Mills(a) and *Benn v. Dixon*(b) must be except-
 [*612] ed,) the court, in applying the rule, has leant against

• conversion as strongly as is consistent with the supposition that the rule itself is well founded. In *Howe v. Lord Dartmouth*, Lord Eldon appears to have considered that the disposition of the personal estate in the same clause with land or other imperishable property is not material ; and the cases of *Mills v. Mills* and *Benn v. Dixon* apparently evince the same opinion. But in *Bethune v. Kennedy*,(c) at the Rolls, Lord Cottenham appears to have thought that circumstances, unexplained, might alone be sufficient to exclude conversion. The words of the bequest there used by the testatrix were “all I do or may possess in the funds, copy or leasehold estates.” In *Alcock v. Sloper*,(d) the testator gave the rest, residue, and remainder of his estate and effects, real and personal, to his executors, upon trust to per-

(a) 7 Sim. 501.

(b) 10 Sim. 636.

(c) 1 Myl. & Cr. 114.

(d) 2 Myl. & K. 699.

1844.—*Hinves v. Hinves*.

mit his wife to receive the rents, profits, dividends, and annual produce for her life, and, immediately after her death, upon trust to sell his freehold house and his leasehold houses by auction; and directed a Mr. Abbott to be employed as auctioneer, to convert the whole of his estate and effects into money, and to distribute *itas directed* in the will. Now, under the will, it is clear that money in the funds acquired after the date of the will would have passed; yet Sir J. Leach said, the word "dividends" had reference to Long Annuities, of which part of the testator's estate consisted, and that the use of the word "dividends" was equivalent to a direction that the widow should enjoy the Long Annuities in specie. He thought, also, that the direction that the leaseholds should be sold after the wife's death evinced an intention that the other perishable property should not be converted at the testator's death; and, further, that the direction that Abbott should be employed, after the wife's death, to convert the whole of his estate and effects into money, [*613] for the purpose of distribution, excluded the notion that any part of it should be sold at the testator's death. It is obvious, that, upon the language of the will, a judge disposed to apply the reasoning afterwards adopted in *Mills v. Mills* might have found very pertinent arguments in support of a different decision. In *Collins v. Collins*,^(a) stress appears to have been laid upon the direction to divide the testator's property amongst particular persons at his death. I cannot but regard that case, which has been since approved by Lord Cottenham,^(b) as evidencing the present leaning of the courts, to which I have already alluded; for the direction to divide was as applicable to the property in a converted as in an unconverted state. In *Bethune v. Kennedy* the gift was to the sisters of the testatrix during their lives, and at the decease of both to be equally divided between her cousins named, share and share alike. In *Goodenough v. Tremamondo*,^(c) Lord Langdale held the word "rents," in the gift of the residue for life, to be conclusive that the leaseholds

(a) 2 Myl. & K. 703.

(b) See 4 Myl. & Cr. 300.

(c) 2 Beav. 512. See the cases collected, Id. 514, n.

1844.—*Hinves v. Hinves*.

were not to be converted. In *Daniel v. Warren*,^(a) the decision goes perhaps further than any of the cases I have cited, and in the same direction.

In the present case, the gift is of the testator's "property" generally; there is no specification of particulars, and the property described in this general way is to go to persons in succession. Stopping here, there is no doubt that the rule of the court would require conversion; and the inquiry must be, whether, in the directions he has given for the enjoyment of his property by the cestui que trusts, or in the management of it by his trustees, there is anything which a conversion at his death would defeat. It is, therefore, necessary to examine
[*614] minutely and deal critically with the language of this will.

[His Honor then referred to the several clauses of the will—the appointment of executors; the direction "not to sell witt," which he construed "without," consent; the fact that words originally in the will, but afterwards erased, showed that the testator was aware of the propriety of directing an investment where investment was intended; the gift of Banister's debt to the widow "at her decease," and the gift to the minister of the meeting-house, after the decease of his wife,—and concluded, that he could not hold, in this case, that the Long Annuities and the leaseholds were not to be enjoyed in specie, without in effect deciding against the cases he had referred to.]

(a) 2 Y. & Coll. C. C. 290.

1844.—Re Ryley.

IN THE MATTER OF THE ACT 1 WILL. 4, C. 60, AND IN THE
MATTER OF GEORGE RYLEY.

1844: March 23.

Three trustees, two of whom were creditors of A., joined in making promissory notes for securing to the other creditors of A. a composition on their respective debts, and took a conveyance and assignment of the real and personal estate of A., upon trust, after paying the costs and charges, to indemnify the three trustees in respect of the promissory notes, and then to pay the two trustees, who were creditors, a like composition on their respective debts, and to pay the surplus to A. After two of the trustees had received part of the personal estate of A., and had paid the promissory notes to a larger amount than they had received, the other trustee (who was one of the creditors) went out of the jurisdiction of the court. There was no power in the deed to appoint new trustees:—*Held*, on the petition of the two trustees, that the trustee out of the jurisdiction was a trustee within the act 1 Will. 4, c. 60, for the petitioners and himself, and the court, without directing a bill to be filed, appointed another trustee in his stead.

On the 4th of October, 1841, a fiat in bankruptcy was issued against Robert Ryley. On the 22d of October, a meeting of the creditors of Robert Ryley was convened, at which the creditors agreed to accept a composition of 6s. 8d. in the pound on the amount of their respective debts; and an agreement in writing of that date was made and signed by such creditors, whereby *they agreed to release and discharge the es- [*615] tate of Robert Ryley and his sureties in respect of their debts, provided the composition was secured by the notes of hand of John White, and Joseph Lichfield and George Ryley, (the two petitioning creditors.) payable by instalments at six and twelve months; and White, Lichfield, and George Ryley agreed to secure the composition, provided and on condition that Robert Ryley executed to them a release and assignment of all his real and personal estate, upon trust to secure the same composition, and the costs and expenses, and provided that all the creditors of Robert Ryley consented to the arrangement. All the petitioning creditors, and the creditors who did not hold securities for their debts, consented to and signed the agreement. By an indenture dated the 26th of October, 1841, made in pursuance of the said agreement, in consideration of the said release thereby

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agreed to be given by his creditors, and in order to indemnify White, Lichfield, and George Ryley for becoming security for such composition, the said Robert Ryley granted, conveyed, and assured, and bargained, sold, assigned, and transferred, the messuages, lands, and hereditaments of or to which he, or any person or persons in trust for him, was or were seised or entitled for any estate of freehold of inheritance, or freehold only, with their appurtenances, and all his leasehold messuages and tenements, and all and singular his stock in trade, goods, furniture, plate, linen, and effects, debts, and other personal estate and property, whatsoever and wheresoever, unto and to the use of White, Lichfield, and George Ryley, their heirs, executors, administrators, and assigns, according to the nature and qualities thereof respectively, upon trust that they, and the survivor of them, and the heirs, executors, administrators, and assigns of such survivor, should, with all convenient speed, sell, get in, and convert [*616] into money the said real and personal property, *(subject or not subject to the several mortgages affecting the same, and with or without the further assent of the said Robert Ryley;) and to stand possessed of the money to arise by such sale, and of the said real and personal estate and rents and profits thereof in the meantime, upon trust that they, White, Lichfield, and George Ryley, and the survivors of them, and the executors and administrators of such survivor, should thereout, in the first place, pay the costs, charges, and expenses of the petitioning creditors of the said fiat, the costs and expenses of the indenture and of the execution of the trusts thereof, and, in the next place, retain and reimburse themselves all sums which they or either of them should have paid to any creditor or creditors for compounding his or their respective debt or debts, and for obtaining a release or releases for the same, and then should retain and pay to Lichfield and George Ryley 6s. 8d. in the pound on the amount of their respective debts, and, if any surplus should remain, to pay such surplus to Robert Ryley, his executors, administrators, or assigns. The indenture contained no provision for the appointment of new trustees. White, Lichfield, and George Ryley accordingly gave their joint and several pro

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missory notes to the other creditors for the payment of the amount of the composition on their respective debts.

1842: *Nov. 19th*.—George Ryley having afterwards gone abroad, White and Lichfield applied by petition, under the stat. 1 Will. 4, c. 60, for the appointment of a person to execute a conveyance of the trust estates of his room.

1844: *Feb. 13th*.—The Master, by his report, found, that, in part performance of the trusts of the indenture of conveyance and assignment of the 26th of October, 1841, the stock in trade and household effects of Robert Ryley had been *sold, and the proceeds, amounting to 827*l.* 11*s.* 1*d.*, or [*617] thereabouts, had been paid to and received by the petitioners White and Lichfield; and the Master found, that White and Lichfield had advanced and paid various sums of money, amounting in the whole to 1363*l.* 16*s.* 7*d.* on account, or in payment and discharge of the debts of Robert Ryley, or the compositions agreed to be paid thereon, and also on account of the costs the payment whereof was provided by the said trust deed, leaving a balance of 538*l.* 8*s.* 6*d.*, or thereabouts, due to White and Lichfield; but the Master found that there had not been any payment made to George Ryley in respect of the debt due to him as aforesaid. The Master also, by his report, stated, that it appeared to him, that, in the event of the said trust estate being insufficient to repay to the petitioners White and Lichfield the amount due to them as aforesaid, George Ryley might be liable to contribute to them his proportion of the amount which might be ultimately due to them in respect of their having paid and satisfied the several promissory notes so made and signed by him and them respectively, and that no evidence had been laid before him that the costs, charges, and expenses for which George Ryley was liable, and the payment whereof was provided by the indenture, had been paid or satisfied, or that George Ryley himself had not paid, or otherwise become liable to pay, any sum of money in execution of the trusts of the indenture. The Master also found, that, except as before mentioned, the trusts of the indenture were wholly unperformed, and still re-

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mained to be executed ; and, therefore, he found and certified, that the freehold and leasehold, and other personal estates and effects comprised in the trust deed, so thereby conveyed, assigned and assured, except the stock in trade, and household furniture and effects which had been so sold as before mentioned, were vested in George Ryley, jointly with *the [*618] petitioners White and Lichfield, upon the trusts thereof declared by the said deed. And the Master found, that George Ryley was out of the jurisdiction, and not amenable to the process of the court ; and in that respect the Master found him to be a trustee of the said freehold, and leasehold, and other personal estates and effects, within the intent and meaning of the act, and that he was a trustee, in the first place, for himself and such other of the creditors of Robert Ryley, entitled to the benefit of such deed of trust, as had not been paid or satisfied the amount agreed to be accepted by them respectively in satisfaction of their respective debts ; and, in the next place, for the petitioners and himself the said George Ryley, for the purpose of securing to them respectively, or otherwise indemnifying them respectively against all sums of money, costs, charges, and expenses paid, expended, or incurred by them respectively in and about the execution of the trusts of the said deed ; and, subject thereto, for the said Robert Ryley. The Master further stated, that, as it appeared to him that George Ryley had a beneficial interest in the trust premises, and that the trusts of the deed still remained to be performed, he had not proceeded to approve of a person to convey the said estates in the place of George Ryley.

White and Lichfield presented their petition, praying a declaration that George Ryley was a trustee of the freehold, leasehold, and other personal estate comprised in the deed, within the act ; and that he was such trustee in the first place for the petitioners and himself, for the purpose of securing to them respectively, or otherwise indemnifying them respectively against all sums of money, costs, and charges, paid or expended or incurred by them respectively in the execution of the trusts of the indenture, and, in the next place, for securing to [*619] *himself and the petitioner Lichfield 6s. 8d. in the pound

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on their respective debts, and, subject thereto, for Robert Ryley. And they prayed, that some person might be appointed in the place of George Ryley, to convey, assign, and assure the trust estates and premises to the petitioners, or as they should appoint.

Mr. *Heathfield*, for the petition, referred to the sections 8, 9, and 15 of the stat. 1 Will. 4, c. 60. The absent trustee, in this case, had both an interest and a duty.

The VICE-CHANCELLOR made the declaration sought by the prayer; and referred it back to the master, to see if there was any power in the trust deed to appoint a new trustee, and, if he should find that the deed contained no such power, then to approve of some proper person to be a trustee jointly with the petitioners, instead of George Ryley, and also to approve of a proper person to convey, or join in conveying, the trust estates and premises to the petitioners and such new trustee; the conveyance to be settled by the master.

*YOCKNEY v. HANSARD.

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1844: 5th, 8th, and 10th July.

Bequest of an annuity of 800*l.* to the testator's wife, followed by a bequest (among others) of an annuity of 200*l.* to the testator's daughter, and a subsequent direction, in the same instrument, that, at the death of the testator's wife, the daughter was to have 400*l.* a year:—*Held*, that the annuity of 400*l.* given to the daughter was in substitution for, and not in addition to, the prior annuity of 200*l.* given to the same legatee.

LUKE HANSARD, by his will, dated in 1828, bequeathed unto his two sons James and Luke two sums of 24,000*l.* stock, (which, he stated, yielded as dividends 1450*l.*,) upon trust to pay quarterly, as the dividends thereon became due, to his widow 200*l.*, making yearly 800*l.*; and he gave out of the same dividends to his daughter Hannah Davies 200*l.* a year, to be paid quarterly, and 100*l.* a year to his daughter Letitia Yockney, payable in the

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same manner, and also a sum of 120*l.* a year to his sister Sarah ; and, after bequeathing various other legacies, the testator proceeded :—" Ninthly, when my wife departs this life, then my daughter Hannah is to have out of the trust fund dividends 400*l.* by the year, to be paid quarterly, as before ; and Letitia to have 200*l.* in the same manner. And, in the event last mentioned, the departure from this world of my wife, my desire is, that 4000*l.* be sold out of the aforesaid first mentioned trust fund, 1000*l.* of which to be given to my daughter Hannah, 1000*l.* to my daughter Letitia, 1000*l.* to my son Thomas, and the other 1000*l.* to be equally divided between my two grandsons, Luke James and Luke Henry Hansard. So, on the death of my sister at Norwich, 2000*l.* is to be sold out, 1000*l.* of which is to be given to Mary Anne, eldest daughter of my son Thomas, and the other 1000*l.* to Marianne, eldest daughter of my son James. Tenthly, as to all the residue of this funded stock, I give unto my two sons, James and Luke, be the amount what it may, with all the dividends due thereon, for their own sole use and benefit, subject to such payments as I may hereafter appoint by any separate codicil or codicils to this my will." This was followed by several

other testamentary dispositions, not affecting the question [*621] in the cause. *The ultimate residue of his estate and effects the testator gave to his said sons James and Luke, whom he appointed his executors.

The testator died in 1828. The widow survived him, and died in 1834. From the widow's death the executors paid the testator's daughters, Hannah, 400*l.* a year, and Letitia 200*l.* a year, treating these sums as substituted for the annuities of 200*l.* and 100*l.* before given.

The bill was filed in 1843, after the death of Letitia Yockney, by her representative, against the surviving executor of the will, and the representative of the deceased co-executor, (Hannah being also a defendant,) claiming a sum of about 800*l.* for arrears of the first annuity of 100*l.*, contending, that the second annuity of 200*l.* was additional to, and not in substitution of, the first.

Mr. *Lloyd*, for the plaintiff, and Mr. *W. D. Lewis*, for the tes-

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tator's daughter Hannah Davies, the defendant interested in supporting the like construction of the will.

Mr. *Tinney*, Mr. *Burge*, Mr. *Busk*, and Mr. *Greene*, for the other defendants.

The cases cited were *Windham v. Windham*,(a) *Curry v. Pile*,(b) *Allen v. Callow*,(c) *Osborne v. Duke of Leeds*(d) *Hurst v. Beach*,(e) *Brine v. Ferrier*,(f) *Attorney General v. George*,(g) *Tweeddale v. Tweeddale*,(h) **Guy v. Sharpe*,(i) [*622] *Pym v. Lockyer*,(k) *Martin v. Drinkwater*,(l) *Baylee v. Quin*,(m) *Russell v. Dickson*,(n) *Suisse v. Lord Lowther*.(o)

VICE-CHANCELLOR :—In this case, I assume, for the purpose of the argument, that the rule of law, where there are two distinct gifts of different amounts, given by the same instrument, with nothing more to explain them, is in favor of both the gifts taking effect. The only doubt I have had in this case is, whether these are in fact two distinct gifts, or whether the second does not, in point of grammatical construction, include the first ; in other words, whether this part of the will is not a statement of the amount of the income to be derived from a specific fund, which the testator's daughters are to have at different times, and under different circumstances. I take that as the question to be decided ; and I entirely agree with the observations made by Mr. Lloyd and Mr. Lewis, that there is nothing in the decided cases which will assist me in determining the question, and that the case is simply one of construction. If the will had been expressed thus :—"I give to my two sons 24,000*l.* consols, and 24,000*l.* reduced stock, the dividends whereof amount to 1440*l.*, and at my death, out of those dividends, I give my wife 800*l.* per annum, and out of the same dividends I give my daughter 200*l.* per annum ; and when my wife dies, then I will that my

(a) Rep. t. Finch, 267.

(b) 2 Bro. C. C. 225.

(c) 3 Ves. 289.

(d) 5 Ves. 369.

(e) 5 Mad. 351.

(f) 7 Sim. 549.

(g) 8 Sim. 138.

(h) 10 Sim. 453.

(i) 1 Myl. & K. 589.

(k) 5 My. & Cr. 29.

(l) 2 Beav. 215.

(m) 2 Dru. & War. 116.

(n) Id. 133.

(o) 2 Hare, 424.

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daughter shall, out of the said dividends, have 400*l.* per annum ;”—the plain and obvious grammatical, *and I may almost say the necessary, construction of the words, would be, that the testator thereby stated the full amount of income which at different times, and in different circumstances of the case, the daughter was to have. The words of the will are not expressly the same as those which I have supposed ; but they are to the same effect. In the second gift the testator directs that his daughter shall, upon the death of his wife, out of the dividends, have 400*l.* per annum, having, before said, that out of those dividends she should have 200*l.* ;—the residue being given to the sons in a general residuary clause : that is clearly the true construction of the will. Without departing, therefore, from decided cases, but merely acting upon the words of the will, I think the second gift is the full amount of the income which the testator meant his daughter to have.

The case is one of so much doubt, that I cannot say the party making the claim was not justified in submitting the point to the court ; but as all the parties have acted for so many years upon this construction, I cannot give the costs out of the estate.

Bill dismissed without costs.

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*HARROP v. HOWARD.

1845 :—January 27th and 29th.

Construction of a clause framed to restrain anticipation by a married woman of property settled to her separate use.

It is not in all cases necessary that negative words should be introduced in the receipt clause, to complete the restraint on anticipation, for that clause must be construed to relate to the income, subject to such restraints as are imposed by the former part of the settlement.

THE principal object of the suit was to establish the liability of an executor and trustee to make good certain funds which it was alleged were lost by his negligence. In the course of the cause, it was contended, that the conduct of one of the daughters

1845.—Harrop v. Howard.

of the testator had the effect of precluding any complaint, on her part, relating to the loss which had taken place. To this it was answered, that the testator's daughter had not been in a situation in which her acts could affect her future interest in the trust property.

Mr. *Romilly* and Mr. *Smythe*, for the plaintiff, and Mr. *Kenyon Parker* and Mr. *Greene*, for the defendants referred, in their argument, to the cases of *Barrymore v. Ellis*,^(a) *Brown v. Bamford*,^(b) *Moore v. Moore*,^(c) and *Medley v. Horton*.^(d)

VICE-CHANCELLOR :—One question raised in the argument of this case was, whether, according to the construction of the settlement made on the marriage of Mrs. Vaudrey, that lady had power to affect, by anticipation, the property settled to her separate use. The trusts of the settlement are expressed as follows :—

“In trust that they the said John Harrop and John Brooke, or the survivor of them, or the executors and *ad- [*625] ministrators of such survivor, do and shall, from and immediately after the solemnization of the said intended marriage, and as soon, and from time to time, as the said share, legacies, or bequests, or other sum or sums of money, interest, and effects shall become payable, collect, get in, and receive the same, and do and shall lay out and invest in their or his name or names the money to arise and be received as aforesaid, in the purchase of a share or shares of the parliamentary stocks or public funds of Great Britain, or at interest upon Government or real securities, and do and shall stand and be possessed of, and interested in, the said several monies, stocks, funds, and securities, and the interest, dividends, or annual produce thereof, upon the trusts, and for the intents and purposes, and with, under, and subject to the powers, provisoes, declarations, and agreements hereinafter expressed and declared of and concerning the same, that is to say, upon trust that they the said John Harrop and

(a) 8 Sim. 1.

(b) 11 Sim. 127.

(c) 1 Collyer, 54.

(d) Vice-Chancellor of England, 15th July, 1844.

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John Brooke, or the survivor of them, or the executors or administrators of such survivor, do and shall pay the interest, dividends, and annual produce of the said several trust monies, stocks, funds, and securities, into the proper hands of the said Eliza Heaword, or into the hands of such person or persons as she, by any note or writing under her hand, shall from time to time appoint to receive the same, during her life ; but not so as, during the joint lives of herself and the said John Collier Vaudrey, her said intended husband, to dispose thereof or deprive herself of the benefit thereof by mortgage, charge, sale, assignment, or otherwise in the way of anticipation, to the intent the same may be for the sole and separate use of the said Eliza Heaword, and may not be subject to the debts, control, disposition or engagement of the said John Collier Vaudrey, her said intended husband, or any other person with whom she may, [*626] after his decease, happen to intermarry. And it is hereby agreed and declared, that the receipt or receipts of the said Eliza Heawood, or of such person or persons as she shall appoint to receive the same, and his, her, or their receipt or receipts only shall be a good and sufficient discharge, and good and sufficient discharges, to the person or persons paying the same for so much thereof as in such receipt or receipts shall be acknowledged or expressed to be received."

Now, upon the construction of the first part of the above clause,—that which precedes the receipt clause,—I am of opinion that Mrs. Vaudrey is restrained from anticipation. If it be imperatively necessary that negative words should be used to restrain anticipation, upon which I give no opinion, (a) I think such words are sufficiently used in that member of the sentence I am now considering. The only question, then, will be, whether the effect of that member of the sentence is destroyed by the absence of negative words in the receipt clause which follows it. I am of opinion that the receipt clause can have no such effect. Upon every principle of construction the receipt clause must in this case have reference to the antecedent part of the entire sentence. The first part gives the income to the lady or her ap-

(a) See *Blacklow v. Laws*, 2 Haro, 49.

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pointee so and in such manner that she shall not have power to anticipate her interest. The second enables her to give receipts for the income so restrained. I cannot read the receipt clause as displacing the restraint which the gift plainly imposes. This is a common mode of expressing the purpose intended, and in a case in which the law requires no technical words to give effect to the intention, I think the above expressions are sufficient.

This case, I may observe, is unlike any of the cases I was referred to.

*COTTINGHAM v. EARL OF SHREWSBURY. [*627]

1843 : February 28th ; March 1st.

In a suit by the heir of the mortgagor, against different classes of mortgagees and incumbrancers on the estate, some of whom were in possession, a decree for redemption was made, under which certain of the defendants were declared entitled to a lien on the estate, and the accounts were directed to be taken, and upon the plaintiff paying to the defendants, the incumbrancers, what should be found due to them respectively, within the time thereby limited, they were ordered to convey the estates to the plaintiff; but in default of the plaintiff making such payment, his bill was ordered to be dismissed with costs. In a supplemental suit, brought by some of the defendants to the original suit against the plaintiff, and the other defendants, a decree for carrying on the accounts was made:—*Held*, that the plaintiffs in the supplemental suit, who were incumbrancers subsequent to other defendants, were not entitled, under the decree, to exhibit interrogatories for the examination of their co-defendants in the original suit, (the prior incumbrancers, who were mortgagees in possession,) as to their receipts in respect of the mortgaged premises, such examination not being necessary for the purposes of the suit.

The Court will try a case between co-defendants, and the co-defendants will be bound by the result of such trial, where the plaintiff is entitled to relief, and cannot obtain relief unless that be done ; but, if the relief to be given to the plaintiff does not require or involve the decision of any case between co-defendants, the co-defendants will not be bound, as between each other, by any proceedings which may be necessary only to the decree the plaintiff obtains.

By indentures of lease and re-lease, and mortgage, dated respectively the 3rd and 4th of August, 1711, estates at Little Neston, in the county of Chester, stood limited (after prior estates which expired in October, 1766, upon the death of Charles Cot-

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tingham, without issue male) to Thomas Cottingham, the plaintiff's grandfather, for life, with remainder to his first and other sons successively in tail male, subject to a mortgage in fee of the same estates for securing to Edward Foulkes the sum of 700*l.* and interest.

In May, 1783, Thomas Cottingham, the plaintiff's grandfather, died, leaving Thomas Cottingham, the plaintiff's father, his eldest son and heir-at-law, who thereupon became tenant in tail male of the estates, subject to the said mortgage of the 3rd and 4th of August, 1711. In June, 1825, Thomas Cottingham, the plaintiff's father, died, leaving the plaintiff (Thomas Cottingham) his eldest son and heir-at-law, who thereupon became entitled to the same estates, subject to the same mortgage.

In April, 1828, the plaintiff suffered a common recovery of the estates of which he was tenant in tail male under the settlement of the 3rd and 4th of August, 1711, and thereby acquired the fee-simple in those estates, subject to the mortgage. By divers mesne assignments, the mortgage of the 3rd and 4th of August, 1711, became vested in the several different parties who were defendants in the cause.^(a)

The bill was filed on the 16th of May, 1828, against numerous defendants, who, for the present purpose, may be described as of two classes:—first, those claiming to be entitled as mortgagees of the lands, or parcels of the lands, comprised in the indentures of the 3rd and 4th of August, 1711, derivatively under that mortgage, of which class were the defendants John Horridge and others; secondly, those claiming to be mortgagees of the same estate, or parts thereof, in respect of incumbrances, charges, or liens created long subsequently to the settlement of August, 1711, to which class Messrs. Praed & Co., John Cottingham, and others, belonged. The bill admitted the mortgage of the 3rd and 4th of August, 1711, and the rights under that mortgage of the first of these classes of defendants, amongst whom the estates comprised in the mortgage had been parcelled out; and it charged some of such defendants as being mortga-

^(a) The names of the parties appear in the decree. It is not necessary to this point that the derivative interests should be more particularly stated.

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gees in possession of parts of the estates comprised in their several securities. The bill suggested the existence of claims by the defendants of the second class, upon the estates, or some part thereof, in respect of mortgages created since August, 1711; and it charged that none of such last-mentioned claims were valid as against the plaintiff.

The bill prayed, that an account might be taken of *what, if anything, was due for principal and interest on [*629] the security of the said hereditaments and premises, under or by virtue of the indentures of mortgage of the 3rd and 4th of August, 1711; and that an account might also be taken of the rents and profits of the said hereditaments and premises accrued due since the death of Thomas Cottingham, the father of the plaintiff, which had been received by, or by the order or for the use of, the defendants respectively, or any of them; and that the plaintiff might be at liberty to redeem the said hereditaments and premises upon payment of what, if anything, should appear to be due to the defendants on a balance of the said accounts, the plaintiff thereby offering to pay the same; and that the defendants might be decreed upon payment of what should be so found due to them, to deliver up the possession of the hereditaments and premises to the plaintiff, and to reconvey the same to the plaintiff, his heirs and assigns, or as the plaintiff should direct or appoint, free from all incumbrances made by them (the defendants,) or any persons claiming under them; and that all proper parties might be ordered to join in such reconveyance; and that the defendants might be ordered to deliver up to the plaintiff all the title-deeds, evidences, and writings in their custody or power relating to the hereditaments and premises; and that if, upon taking the said accounts, it should appear that the rents and profits of the hereditaments and premises accrued due since the death of Thomas Cottingham, the father of plaintiff, had been more than sufficient to pay and satisfy what was due and owing in respect of principal money and interest under the mortgage, then that the defendants might be ordered to pay the residue thereof to plaintiff, and for general relief.

The cause was heard in 1831, when the bill was dis-
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[*630] missed with costs, as against several of the *defendants, amongst whom was the Earl of Shrewsbury. And it was referred to the master to take an account of what was due to the defendants H. Potts, C. Potts, J. Horridge and R. Richardson, J. Wright and J. H. Fisher, W. Smith, W. Harris, R. Lee and T. Cotterell, for principal and interest in respect of the mortgage for 700*l.*, created by the indentures of the 3rd and 4th of August, 1711, and to tax them their costs of this suit. And to take an account of the rents and profits of the hereditaments and premises accrued due since the death of Thomas Cottingham, the father of the plaintiff, received by the defendants H. Potts, C. Potts, John Horridge and R. Richardson, J. Wright and J. H. Fisher, W. Smith, W. Harris, R. Lee and T. Cotterell, or any or either of them, or by any other person or persons, by their or any or either of their order, or for their or any or either of their use, or which, without their or any or either of their wilful default, might have been received thereout. And it was ordered, that what should be coming on the said account of rents and profits should be deducted out of what should be found due to the defendants H. Potts, C. Potts, John Horridge and R. Richardson, J. Wright and J. H. Fisher, W. Smith, W. Harris, R. Lee and T. Cotterell, for such principal, interest, and costs as aforesaid. And it was declared, that the defendants W. Praed, W. T. Praed, Sir Digby Mackworth, and Vere Fane, had a lien on all the hereditaments comprised in the deeds of the 15th and 16th days of January, 1823, for the amount of the several sums advanced by them to the defendant John Cottingham, with interest on such advances after the rate of 5*l.* per cent. per annum. And it was referred to the master to take an account of what was due to the defendants W. Praed, W. T. Praed, Sir Digby Mackworth, and Vere Fane, for principal and interest on their said equitable mortgage of the hereditaments and premises

[*631] ses*in the pleadings mentioned, and to tax them their costs of this suit. And it was ordered, that the plaintiff should pay unto the defendants W. Praed, W. T. Praed, and Sir Digby Mackworth, and Vere Fane, what the master should find to be due to them for such principal, interest, and costs. And it was referred to the master to take an account of all monies received

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by the defendant John Cottingham, or by any other person or persons by his order, or for his use on account of the said hereditaments and premises, and to compute interest thereon after the rate of 5*l.* per cent. per annum, from the respective times of receiving the same, and to take an account of all monies paid by the defendant John Cottingham on account of the said estate and premises, or in payment of securities on the said estate and debts of his late father Thomas Cottingham, and to compute interest thereon after the rate of 5*l.* per cent. per annum, from the respective times of such payment, and in taking such account to charge the defendant John Cottingham with what the plaintiff should so pay to the defendants W. Praed, W. T. Praed, Sir Digby Mackworth, and Vere Fane, for such principal and interest as aforesaid. And the defendant John Cottingham was also to be charged with the sum received by him on account of the verdict obtained in an action against Sir Thomas Stanley Massey. And the master was to tax the defendant John Cottingham his costs of this suit up to the time of the decree; and the plaintiff was ordered to pay the same when taxed to the defendant John Cottingham. And it was declared, that the defendant John Cottingham had a lien on all the hereditaments comprised in the deeds of the 15th and 16th days of January, 1823, for the amount of what should be found due to him with interest thereon, at the rate of 5*l.* per cent. per annum. And upon the plaintiff his paying unto the defendants H. Potts, C.

Potts, John *Horridge and R. Richardson, T. Wright [*632] and J. H. Fisher, W. Smith, W. Harris, R. Lee and T.

Cotterell, and to the said defendants W. Praed and W. T. Praed, Sir Digby Mackworth, and Vere Fane, and to the defendant John Cottingham, respectively, what should be due to them on the several accounts thereinbefore mentioned, after such deductions made thereout as aforesaid, within six months after the master should have made his report, at such time and place as the master should appoint,—it was ordered, that the defendants H. Potts, C. Potts, John Horridge and R. Richardson, J. Wright and J. H. Fisher, W. Smith, W. Harris, R. Lee and T. Cotterell, and the defendants W. Praed, W. T. Praed, Sir Digby Mackworth, and Vere Fane, and the defendant John Cottingham, re-

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spectively, should convey and assign the said hereditaments and premises free and clear of and from all incumbrances done by them or any or either of them, or any claiming by, from, or under them, or any or either of them, and deliver up all deeds, papers, and writings in their or any or either of their custody or power relating to the said mortgaged premises upon oath to the plaintiff, or to whom he should appoint; but in default of the plaintiff his paying to the defendants H. Potts, C. Potts, John Horridge and R. Richardson, J. Wright and J. H. Fisher, W. Smith, W. Harris, R. Lee and T. Cotterell, and the defendants W. Praed, W. T. Praed, Sir Digby Mackworth, and Vere Fane, and the defendant John Cottingham, respectively, what should be certified to be due to them on the several accounts thereinbefore directed, after such deductions made thereout as aforesaid, by the time aforesaid,—it was ordered that the plaintiff's bill should from thenceforth stand dismissed with costs. And in case it should appear on taking the said accounts that the defendants were fully paid or over-paid, then the consideration of all further directions, and of the subsequent costs of the [*633] defendant *John Cottingham, was reserved until after the master should have made his report. And for the better taking the said several accounts, the parties were to produce before the master, upon oath, all deeds, books, papers, and writings in their custody or power relating thereto, and were to be examined upon interrogatories as the master should direct, who, in taking the said accounts, was to make unto the parties all just allowances, and any of the parties were to be at liberty to apply to this court as they might be advised. And this decree was to be binding on the defendants H. Potts, C. Potts, R. Richardson, R. Lee, and T. Cotterell, unless they, on being served with a subpoena to show cause against the same, should, at the return thereof, show unto this court good cause to the contrary; but before they were to be permitted to show such cause, the defendants were to pay unto the plaintiff his costs of the day's default in appearance.

It was afterwards found, that the dismissal of the bill against Lord Shrewsbury was a mistake, and the decree was rectified in that respect, by an order of the 15th of April, 1833. After

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divers proceedings had been had, it was discovered, that the defendant R. Richardson died in August, 1835, and that many of the proceedings under the decree had taken place in an abated suit, and were consequently irregular and not binding upon the absent parties. Upon this irregularity becoming known, a bill, called a Bill of Revivor and Supplement, was filed, in which the said W. T. Praed, Sir Digby Mackworth, and Vere Fane were plaintiffs, and Dorothea Richardson, The Rev. J. Bower Roberts, Thomas Cottingham, John Earl of Shrewsbury, H. Potts, C. Potts, John Horridge, John Cottingham, W. Smith, J. Wright, J. H. Fisher, W. Harris, and T. Cotterell were defendants, stating the original suit and proceedings, the death of R. Richardson, *and the consequent abatement of the suit, [*634] and praying, amongst other things, that the suit and proceedings might stand and be revived, and that the plaintiffs might have the benefit of the decree and the other proceedings in the cause, and, if necessary, that accounts might be taken, as therein mentioned.

In the decree made on the hearing of the last-mentioned cause, and in another cause of the like nature, intituled, *Praed v. Jerningham*, on the 13th of January, 1841, it was ordered, that the decree of the 6th of December, 1831, made on the hearing of the former cause, (*Cottingham v. John Earl of Shrewsbury and others*), and the accounts and inquiries thereby directed, should be carried on and prosecuted by and between the parties to these suits, in like manner as thereby directed as to the parties to the said former suit; and the court reserved the consideration of all further directions, and of the costs of these suits, in like manner as the same were reserved by the former decree, and any of the parties were to be at liberty to apply as there should be occasion.

In the course of the proceedings before the Master, after the last-mentioned decree, Messrs. Praed & Co. exhibited interrogatories for the examination of their co-defendants, including John Horridge. The Master allowed the interrogatories, (a) and his certificate was excepted to by John Horridge.

(a) The interrogatory was as follows :—

“Have not you or some and which of you, or some other person or persons, and

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[*635] *Mr. *Anderdon* and Mr. *Terrell*, for Horridge, the exceptant, a defendant in both suits, cited *Pentland v. Quarrington*,(a) *Daniels v. Davison*,(b) *Eccleston v. Lord Shelmersdale*,(c) and *Trevelyan v. White*.(d)

Mr. *Cooper* and Mr. *Rolt*, for Praed & Co., defendants to the original bill, and plaintiffs in the bill of revivor, contended, that they, being incumbrancers, of part of the estates, subsequent to Horridge, had a material interest in ascertaining the amount of the prior charges thereon, and were, therefore, entitled to

[*636] examine the prior incumbrancer *with reference to the question, whether he had any and what subsisting claim upon the estate, or whether his incumbrance had been wholly discharged.

who by name, by your or some and which of your order, or for your or some and which of your use, been for some time, and how long since the death of Thomas Cottingham deceased, the father of the petitioner in the said first-mentioned cause, in the possession or receipt of the rents and profits which have accrued due since the decease of the said Thomas Cottingham the father, of some part or parts of the mortgaged hereditaments and premises in the pleadings of these causes mentioned to be comprised in the indentures therein mentioned to bear date the 3d and 4th days of August, 1711? If yea, set forth a short description of such part or parts of the said mortgaged hereditaments and premises whereof the rents and profits which have accrued due since the death of the said Thomas Cottingham the father have been received by you or by any person or persons by your order or for your use, and in whose tenure or occupation such portion or portions respectively have been since the time aforesaid, and at what yearly rent or rents. And do you the said defendants, John Earl of Shrewsbury, John Wright, James Hurtle Fisher, and Edmund William Jerningham, set forth a full and true account of all the rents and profits accrued due in each year since the time aforesaid of the said mortgaged hereditaments and premises, or any part or parts thereof, which have been received by you or by any person or persons, and whom by name, by your or any and which of your order, or for your or any and which of your use, or which without your or some and which of your wilful default might have been received. And do you, the said defendant John Horridge, set forth a full and true account of all the rents and profits accrued due in each year since the time aforesaid of the said mortgaged hereditaments and premises, or any part or parts thereof, (other than and except the rents and profits thereof mentioned to have been received by you for your use in your examination put in the said first-mentioned cause,) which have been received by you or any person or persons, and whom by name, by your order or for your use, or which without your wilful default might have been received. Set forth," &c.

(a) 3 Myl. & Cr. 249.

(b) 16 Ves. 249.

(c) 1 Beav. 396.

(d) Id. 588.

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VICE-CHANCELLOR :—In considering this case, I laid out of view the fact that the interrogatory in question is called a further interrogatory, and that John Horridge had (if such be the case) submitted to be examined as to the same matter under the original decree, and before the decree of the 13th of January, 1841, was made. I threw this point out for the consideration of the counsel for the Messrs. Praed; but they have declined to argue the point; and I am, therefore, enabled to do that which is always the most satisfactory, to decide the case upon its merits.

I think the exception must be allowed.

If the word "interest" is to be understood in an unrestrained or popular sense, it would be difficult to maintain that Messrs. Praed have not an interest in ascertaining the precise amount due to Mr. Horridge and the other mortgagees under the decree. If these amounts were known, it might be in the power of Messrs. Praed to put an end to this protracted suit. And again, if, after the Master's report finding those amounts, the plaintiff should make default in payment, and his bill be dismissed, Messrs. Praed would have an interest in being able to say to the other incumbrancers, "The amount of our several and respective claims is ascertained; and we may now, according to our priorities, wind up this transaction without further litigation, or throw the expense of unnecessary litigation upon the party who occasioned it." For the effect of dismissing the bill under this decree would be the same as a decree *of fore- [*637] closure; it would for ever shut out the interest of the plaintiff. The last of the incumbrancers would become quasi mortgagor, and the others would be first and subsequent incumbrancers, according to their priorities.

But the question before me upon this exception is not whether, in any general sense of the word "interest," the Messrs. Praed have a right to examine Mr. Horridge, or any other incumbrancer, for any purpose collateral to the decree in this suit; but whether they have an interest in so doing for any purpose of this suit. Now, my opinion is, that they have no such interest for any purpose of this suit. This decree does not provide for any relief being given as between the co-defendants, in the

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event of the plaintiff not paying all the defendants. There is not even an inquiry into priorities, nor can any further directions be given for any such purpose. The plaintiff by the bill undertakes to redeem all incumbrances, or that his bill be dismissed, the effect of which, as I have already observed, will be for ever to shut out the plaintiff from all interest in the estate. The decree says: "Let the plaintiff pay all the incumbrancers, or let his bill be dismissed." If the former alternative be adopted, the interrogatory in question will be useless for all purposes; if the latter, they will be equally useless for all the purposes of this suit. The plaintiff must pay every incumbrancer who shall appear not to have been paid, or the bill will be dismissed. Nothing more or different can be done under this decree; nor, I conceive, in this suit. But that is immaterial. It is sufficient to say nothing more or different can be done within the exigencies of this decree.

But it was said, if the bill was dismissed, (that being the only alternative under which the interrogatory could [*638] be of any use, even for a collateral purpose,) that in such case the accounts taken in this cause will be binding on all parties; and if that be so, I should agree with the master. But that, I apprehend, is not the case. The law upon the subject is to be collected from *Chamley v. Lord Dunsany*(a) and *Farquharson v. Seton*.(b) If a plaintiff cannot get at his right without trying and deciding a case between co-defendants, the court will try and decide that case, and the co-defendants will be bound. But if the relief given to the plaintiff does not require or involve a decision of any case between co-defendants, the co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree the plaintiff obtains. In this case the plaintiff asks to redeem all incumbrances, and the decree gives him a right to redeem them all, and dismisses his bill if he does not redeem all. It cannot be necessary for the purposes of such a decree that any account should be taken between co-defendants. These latter observations apply to Horridge in his character of mortgagee. I do not

(a) 2 Sch. & Lef. 690, 709.

(b) 5 Russ. 45.

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apply them to him in his character of purchaser under Thomas Cottingham, the tenant for life. The decree giving Messrs. Praed a lien upon the purchased estate may possibly decide that question. But to that question the interrogatory is irrelevant.

But then it was said, the examination of J. Horridge proposed by this interrogatory might be of a practical utility, and could not be attended with inconvenience to the examinant. This, as a strict question of practice, must be governed by what I have already said. No party can of right examine another party, except for the purposes of the decree. He cannot do so for purposes *collateral to the decree. But I am not prepa- [*639] red to admit the proposition itself. First, it is not certain that the examination will ever be useful even for a collateral purpose. If the plaintiff should pay the amount due to all the incumbrancers, the examination, with its expense and inconvenience, will be thrown away. And, secondly, to the above must be added the further observation, that a party may well be able to prove his case against the plaintiff, but be unable to prove the same thing against a defendant, without great expense and inconvenience. I cannot tell how this may be ; and I cannot, therefore, blame Mr. Horridge for objecting to the commencement of an investigation which is not required by the exigencies of the decree, which may be useless even for any collateral purpose, and which, if once commenced and submitted to, I could not afterwards stop.

COURTENAY v. WILLIAMS.

(See the report of this case, ante, p. 554.)

A SIMILAR course was adopted by his honor the Vice-Chancellor Knight Bruce in *Bristowe v. Wood*, November 6th, 1844, as to making an order in the cause, on further directions, without allowing or overruling the exceptions.

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MEMORANDA.

IN Vacation after Hilary Term, 1844, The Right Honorable Lord *Abinger*, Lord Chief Baron of the Exchequer, died ; and Sir *Frederick J. Pollock*, Her Majesty's Attorney-General, was appointed Lord Chief Baron, and was also sworn of Her Majesty's Most Honorable Privy Council. Sir *William Webb Follett*, Her Majesty's Solicitor-General, was, in the following Easter Term, appointed Attorney-General ; and *Frederick Thesiger*, Esq., was appointed Solicitor-General, and received the honor of Knighthood.

In the Long Vacation, 1844, *F. J. Holt*, Esq., the Vice-Chancellor of the Duchy of Lancaster, died ; and *Horace Twiss*, Esq., one of Her Majesty's Counsel, was appointed Vice-Chancellor of the Duchy. In the same Vacation, *Edward Bellasis*, Esq. ; *James Alexander Kinglake*, Esq. ; and *C. Chadwicke Jones*, Esq., were called to the degree of Serjeant-at-Law.

In Michaelmas Term, 1844, the Right Honorable *Thomas Erskine*, one of the Judges of the Common Pleas, resigned ; and *W. Erle*, Esq., having been previously called to the degree of Serjeant-at-law, was appointed a Judge of the Common Pleas, and received the honor of Knighthood.

In the year 1844, *John Hodgson*, Esq. ; *Charles*
[*641] *Howard Whitehurst*, Esq. ; *William John Alexander*, Esq. ; *Robert Charles Hildyard*, Esq. ; and *James Parker*, Esq., were appointed of Her Majesty's Counsel.

In Hilary Term, 1845, Sir *J. Gurney*, Knight, one of the Barons of the Exchequer, resigned ; and *Thomas J. Platt*, Esq., having been previously called to the degree of Serjeant-at-law,

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was appointed a Baron of the Exchequer, and received the honor of Knighthood.

In Hilary Vacation, 1845, *William Lee*, Esq.; *John Billingsley Parry*, Esq.; and *William Page Wood*, Esq., were appointed of Her Majesty's Counsel. In the same Vacation, Mr. Serjeant *Manning* received the grant of a patent of precedence.

AN

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ACCOUNT.

1. Decree for taking accounts contingent upon a preliminary finding as to the nature of the estate. *Reeve v. Attorney-General*, 193

2. The defendant, who was a customer of, and had an account with, a bank, was also employed by the bank to raise money on certain Spanish bonds, which he accordingly did; the money being afterwards recalled by the mortgagees and not paid, the bonds were sold; and the defendant received the balance, and retained it without the knowledge of the bank. On a bill filed on behalf of the bank for payment of this balance, and also for a general account:—*Held*, that although the defen-

dant, by his answer, said the result of the general account when taken would be in his favor, yet he was not entitled to withhold payment of the balance received by him in respect of the bonds until the general account should be taken; and a decree for payment of that balance and interest was accordingly made, and also the decree for taking the general account. *Gordon v. Pym*, 223

3. As to the rule of the court in requiring the accounts of the estate to be taken before deciding on the construction of a will. *Gaskell v. Holmes*, 438

4. Although the bill brought by the executor stated that the debts, funeral and testamentary expenses, and legacies of the testatrix, had been paid, and the residue specifically appropriated to answer the trusts of the will, and merely sought the direction of the court as to the class of persons entitled to take under such trusts, the court would not decide the question of construction until the accounts of the estate had been taken, unless it should appear that all the class entitled to take were parties to the suit, and competent to bind themselves,—and those parties should waive the accounts of the estate, and accept the same at a given amount,—and the personal representatives should admit assets for all purposes,—upon which consent and admissions a decree might be made, finally disposing of the estate, but saving the rights of creditors. *Say v. Creed*, 455

5. Decree in legatees' suit, on admission of assets, without taking the accounts. *Gordon v. Scott*, 459, n.

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ACCUMULATION.

1. Direction to invest 10,000*l.*, 4*l.* per cent. stock, in the name of trustees, and to pay thereout annuities to various persons amounting in the whole to 400*l.* a year; and that the trustees should hold the said stock and the dividends thereof, subject to the annuities upon trust, as to so much of the dividends as from time to time should fall in by the determination of the annuities until one half of the dividends should have so fallen in, to invest the same and the resulting income thereof, in order to increase the capital of the said fund by accumulation; and so soon as one half of the dividends should have so fallen in, to apply such moiety of the dividends, and also such further parts of the same as should from time to time fall in by the determination of the annuities respectively, and the whole of the dividends, when all the annuities should have ceased, to certain charitable uses. The 10,000*l.*, 4*l.* per cent. stock, was invested according to the will, and was subsequently converted into 3½ per cents., and the trustees thereupon reduced the payments to the annuitants by one-eighth, the dividends having become to that extent insufficient to answer the annuities. The death of some of the annuitants afterwards released a part of the dividends, and the sums so falling in were accumulated. In an information to establish the charity;—*Held*, that although the accumulation of the dividends had not begun until the death of an annuitant, many years after the death of the testator, yet, by the statute 40 Geo 3, c. 98, the accumulation must cease at the expiration of twenty-one years from his death. *Attorney-General v. Poul-den*, 555

2. That the annuitants were not entitled to be paid their annuities in full, either out of the capital, or out of the released dividends, but that the reduction of the stock would operate to produce a proportionate reduction in the several annuities, and in the fund applicable to the charity. *Ib.*

3. That the whole of the accumulated fund, arising before a moiety of the dividends was released by cessation of the an-

nuities, was undisposed of by the will, and formed part of the residuary estate. *Ib.*

See TENANCY IN COMMON.

ACKNOWLEDGMENT.

See DEBTOR AND CREDITOR.

ADEMPTION.

1. The testator bequeathed a sum of 3000*l.* to his daughter for her separate use, for life, with remainder to her children as she should appoint; and in default of appointment, to her children equally, with provisions for survivorship, advancement, and for the substitution of their issue; and, subject to an annuity, and to his debts, he devised and bequeathed all the residue of his real and personal estate (naming securities for money) unto his son absolutely. After the date of the will, the testator gave to his daughter and her husband, a promissory note for 500*l.* then due to the testator. In a suit by the children of the daughter against the son, claiming to have the legacy of 3000*l.* invested and secured for their benefit, the defendant tendered parol evidence that, after the date of the will, the testator was requested by his daughter to confer some benefit on her husband, and that, thereupon, the testator gave her the promissory note, declaring, that it was to be in part satisfaction of the legacy of 3000*l.*; and that the testator was advised by his solicitor, that it was not necessary to alter his will to give it that effect:—*Held*, that this evidence was admissible, as constituting an essential part of a transaction subsequent to, and independent of, the will, of which subsequent transaction there was no evidence in writing. *Kirk v. Eddowes*, 509

2. That the parol evidence was not received as evidence of revocation or alteration of any part of the will, but as evidence of a transaction, whereby the legatee had received part of her legacy by anticipation. *Ib.*

3. That the advance to the daughter and her husband was an ademption *pro tanto* of the legacy bequeathed by the will for the benefit of the daughter and her children. *Ib.*

4. Whether, if the children had been all living at the date of the will, and been

named therein individually, and not merely described as a class, the advance would have been an ademption—*quære?* *Ib.*

ADMINISTRATION.

1. In an administration suit it appeared that the testator and his surviving partners were lessees of certain iron works and premises for a term of years of which eleven were unexpired, and, as such lessees, were subject to covenants, for rent, repairs, insurance, &c.; and that, by the articles of partnership, the executors of a deceased partner might elect to become partners in the concern or to withdraw the capital of the deceased therefrom:—*Held*, that although the executors had elected not to become partners, and no breach of the covenants appeared to have happened, yet as such covenants, if broken, might leave the estate of the testator liable to demands sufficient to absorb it, the interest as well as the principal of the residuary estate must be retained to answer any such possible demands, until the extent of the liability could be ascertained; or if any part of the interest or income should be paid to the tenant for life, it could only be on security to refund the same, if required to satisfy any such future demand. *Fletcher v. Stevenson*, 360

2. In a suit for administration, instituted by the administrator, who was also the first tenant for life of the estate under the will, orders were made for the sale of bank stock and East India Stock, and for the realization of other funds and securities, and the investment of the proceeds in Consols, but such orders were not prosecuted:—*Held*, in a suit by the next tenant for life, that the estate of the administrator (plaintiff in the first suit) was liable for the loss or damage occasioned to the estate of the original testator, by the neglect or omission to carry into effect the directions of the said orders. *Sowerby v. Clayton*, 430

3. Direction by will to lay out personal estate, consisting of bank and East India stock, and monies standing on other funds, and securities, in the purchase of land, to be settled to certain uses:—whether the stocks and funds, not being Consols, ought to be sold and invested in Consols during the interval which elapsed before the purchase of lands was found—*quære?* *Ib.*

See ACCOUNT, 1, 3, 4, 5.

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ADMINISTRATION SUIT.

In an administration suit a party interested in the residue, by his answer, averred that, according to his information and belief, the suit was collusive as between the plaintiffs and the executors and other parties: there being no replication, the allegation was taken as proof of the fact; and it was held, that the fact was no objection to the making of the decree. *Humble v. Shore*, 119

ADMISSION OF ASSETS.

See ACCOUNT, 5.

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ADVERSE POSSESSION.

A. T., a person of unsound mind, living in the family of M. D., became entitled as heiress-at-law to certain lands M. D. received the rents and profits of such lands for thirteen years during the life of A. T., and eleven years after her death, when M. D. died. M. D. had procured A. T. to execute a will devising part of her estate, and also indentures for conveying other parts, to M. D. and her heirs:—*Held*, that M. D. had founded her title upon the instruments which she had procured A. T. to execute in her favor; that her claim to the lands in question must be deemed to be under, and not against, A. T.; and that there was, therefore, no adverse possession as against A. T., or those claiming under her. *Lewis v. Thomas*, 26

AGENT.

See PRINCIPAL AND AGENT.
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AGREEMENT.

Bequest of a share in certain trust funds, in trust for A., his executors, administrators, and assigns, provided that if A. should, during the life of B. or C., assign, charge, or otherwise dispose of his share in the principal or interest thereof, or attempt or

agree so to do, or do any act whereby his share in the said monies, if payable to himself or his executors, or administrators, would become vested in some other person, then, and in such case, all his estate, right, title, and interest in such trust monies should absolutely cease and determine, and thereby and thereupon become absolutely forfeited; and the trustees should thenceforward stand possessed of the shares or share so forfeited, in trust to pay, apply, and dispose of the annual produce thereof, during the lives of B. and C., for the support and maintenance of A., and of his wife and family, or otherwise for his and their benefit, in such manner as the trustees should think proper, and, after the death of B. and C., should settle and assure, or pay and apply, and dispose of the share so forfeited, in trust for, or for the benefit of, A. and his family, in such manner as they should in their discretion think proper. A. assigned all his property to trustees for his creditors, and thereby committed an act of bankruptcy, and, a fiat being issued against him, he was declared a bankrupt:—*Held*, that upon the execution by A. of the assignment, his share and interest in the trust monies became subject to the trust declared by the will for the benefit of A. and his wife and family; that A. was not of necessity entitled to any part of the income of the trust monies separately from his wife and children; but that any interest of A. in the trust monies not applicable for the support and maintenance of his wife and children passed to his assignees on his bankruptcy. *Kearsley v. Woodcock*, 185

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See SUBSTITUTIONAL LEGACY.

ANSWER.

One of several defendants, served with the subpoena to appear and answer, is, under the 16th Order of August, 1841, not bound to put in any answer to the bill, where he is not required to do so by the note inserted at the foot of the bill, under the 17th Order; but in default of answer by such a defendant within the time allowed for answering, the plaintiff may file a traversing note against him, under the 21st Order. *Hughes v. Lipscombe*, 341

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PLEA, 1, 2.

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See SEPARATE USE.

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See STAY OF PROCEEDINGS, 1, 3, 5.

APPEARANCE.

It is not open to one defendant, on an interlocutory application, to object to the irregularity of the service of, and appearance by, another defendant, if the other defendant, having notice of such application, does not himself object on the ground of such irregularity. *Green v. Pledger*, 165.

APPOINTMENT.

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APPORTIONMENT.

1. Apportioning a charge on stock between the life-interest in possession, and the reversion expectant on the decease of the tenant for life. *Bristed v. Wilkins*, 240

2. Apportionment of debt rateably on the legatees who were defendants, and the legatees who were not parties. *Hall v. Palmer*, 538

See STAT. 4 & 5 WILL. 4, c. 22.

APPROPRIATION.

See ASSIGNMENT.

ASSETS.

See ACCOUNT, 4, 5.
STAT. 3 & 4, WILL. 4, c. 104.

ASSIGNEE.

See **EQUITABLE SET-OFF**, 4, 5.

ASSIGNMENT.

A., in India, being indebted to B., in England, directed C. & Co., his agents in London, to hold a sum (equal to a lac of rupees) at the disposal of B., as soon as C. & Co. should be in possession of funds, and informed B. of such directions: C. & Co. also acquainted B. that they had received and registered the order. A. subsequently consigned a ship to another agent, D., and directed him to apply the proceeds of the sale of the ship to the purpose of paying the debt owing to B., and spontaneously informed B. that the ship and freight would be available for his (A.'s.) London accounts, and that B., amongst others, would be paid the lac of rupees thereout:—*Held*, that B. had not, by the correspondence, upon which the plaintiff's case depended, acquired a lien on the proceeds of the ship, and that it was competent to A. to countermand the order to his agents as to the application of such proceeds to the payment of B. *Malcolm v. Scott*, 39

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See **STAT. 1 & 2 VICT. C. 110**, ss. 14, 15

CHARITY.

1. Bequest of Stock to the "Society for Bettering the Condition of the Poor," upon trust to apply the income in the payment of the house-rent of seven or more country laborers in the principality of Wales, selected in a certain manner; and bequest of other stock to the "Society for the Encouragement of Female Servants," upon trust to distribute the income annually in gratuities to servants in the same principality, selected in a certain manner. The two societies renounced the respective trusts, and disclaimed the legacies:—*Held*, that the discretion of the trustees was not, in these cases, of the essence of the trust; that the trust being originally created for certain definite objects, and not a gift to charity generally or indefinitely, it was not a case in which the disposition of the fund required the authority of the sign manual; and that the court would carry the trust into effect by means of a scheme. *Reeve v. Attorney-General*. 191

2. A bequest of a legacy to trustees "upon trust to pay, divide, or dispose thereof, unto or for the benefit or advancement of such societies, subscriptions, or purposes, having regard to the glory of God in the spiritual welfare of his creatures, as they shall in their discretion see fit," construed to be a gift for religious purposes, and restricted to such purposes. *Townsend v. Carus*, 257

3. A bequest for a religious purpose is a valid charitable bequest, although the paramount religious object might, possibly, be effected by an application of part of the fund to a purpose which, separately taken, would not be strictly charitable. *Ib.*

See LEGACY, 5.
STAT 1 WILL 4, c. 60, s. 23.

CHEQUES.

See EVIDENCE, 4.

CHILDREN.

See ADEPTION, 4.
CONSTRUCTION, 1, 2.
CY PRES, 4.
FAMILY.
STATUTE, 1 VICT. c. 26, ss. 3, 24, 33.

CO-DEFENDANTS.

The court will try a case between co-defendants, and the co-defendants will be bound by the result of such trial, where the plaintiff is entitled to relief, and cannot obtain relief unless that be done; but if the relief to be given to the plaintiff does not require or involve the decision of any case between co-defendants, the co-defendants will not be bound as between each other by any proceedings which may be only necessary to the decree the plaintiff obtains. *Cottingham v. Earl of Shrewsbury*, 627

COLLUSION.

See ADMINISTRATION SUIT.
INSOLVENT DEBTOR.

COLONIAL COURT.

See JURISDICTION, 1, 2.

COMMISSION.

See COSTS, 2.

CONSIDERATION.

The testator sealed and delivered a bond, conditioned for the payment of an annuity, after his death, to a woman with whom he had cohabited. At the time he gave instructions to prepare the bond, he stated, that it was not his intention to break off his connexion with the obligee; and he deposited the bond with his solicitors, with whom it remained until after the death of the obligor. On a reference to the Master, he found, that the consideration of the bond was past cohabitation:—*Held*, that the bond was valid; that, being proved to have been sealed and delivered, the retention of it in the hands of the obligor's solicitor did not affect its operation; and that, after the facts had been referred to the Master, and the court was satisfied with his finding, payment of the sum secured by the bond would be decreed, without a trial at law. *Hall v. Palmer*, 532

CONSIGNEE.

Mode of taking accounts, as against mortgagees and consignees, of the produce of a West India estate. *Faulkner v. Daniel*, 218

CONSTRUCTION.

1. The testator bequeathed his residuary estate upon trust for his son for life, and after his decease for the children of his said son; and he directed, that, in case his said son should at any time thereafter come into the actual possession of an estate entailed upon him (the testator) and his issue by his late uncle R. D., of B., then and in such case the provision which he had thereinbefore made for his said son, and all and every the trusts thereof, should cease, determine, and be void, and the trustees should thenceforth stand possessed of the said trust monies for the benefit of his other children, exclusive of his said son. R. D., of B., the late uncle of the testator,

had settled three estates to uses, which included, after several estates for life and in tail, a limitation in remainder to his nephew (the testator) for his life, with remainder to trustees upon trust to preserve contingent remainders, with remainder to the first and other son and sons of the body of his said nephew severally and successively in tail male, with divers remainders over. Before the date of the will, a tenant in tail, who had the then first expectant estate tail, joined with the first tenant for life in a recovery, whereby such tenant in tail had acquired the fee as to one of the three estates; but whether that fact was known to the testator did not appear. After the death of the testator, the same tenant in tail came into possession of the property, and suffered recoveries, whereby the entail as to the two remaining estates was barred; and he then devised the three estates to the son of the testator in fee, subject to certain charges, under which devise the said son afterwards entered into possession of the same three estates:—*Held*, that the possession thus acquired was not an actual possession of the estate entailed upon the testator and his issue within the meaning of the will. *Taylor v. Harewood (Earl.)* 372

2. The testator devised and bequeathed his real and personal estate (subject to certain trusts for the benefit of his wife) to his son absolutely; but if his son should die under the age of twenty-one without issue the testator gave the same to his wife during her widowhood, with remainder (subject to certain legacies) as she should by will appoint; and in default of appointment, or in case she should marry again after the testator's decease, he directed, that, from and after the second marriage or decease of his wife, which should first happen, a moiety of the trust estate, or so much thereof as the appointment should not extend to, should be held in trust for all and every the daughter and daughters who should be then living of his sister Mary Miles, and the issue then living of such of them as should be then dead, equally amongst them per stirpes. The testator's son died under twenty-one, without issue, in the testator's life-time; and the testator's wife also died in his lifetime:—*Held*, that the time of the testator's death was the period at which the persons entitled to take under the said residuary bequest were to be ascertained; that, notwithstanding a daughter of Mary Miles was dead at the date of the will, the children of such daughter, having survived the testator, were entitled, per stirpes, to a share of the said moiety of the residuary

estate; that the children of a daughter of Mary Miles—such daughter being living at the death of the testator's wife, but having died in the lifetime of the testator—were also entitled per stirpes to an equal share of the said moiety of such residuary estate; and that the share of the child of the daughter would not lapse by the death of such child in the lifetime of the testator, but the entire share of the class would be divisible amongst the children belonging to such class who survived the testator. *Gaskell v. Holmes*, 438

See ACCOUNT, 3.

ACCUMULATION, 2, 3.

CREDITORS, 1, 2, 7, 8.

CY PRES, 4,

FAMILY.

LEGACY, 2, 4, 8, 9, 12, 14.

PARTNERSHIP, 1, 3.

CONTEMPT.

Jurisdiction of the court to grant and dissolve an injunction, or commit for contempt, in cases where the plaintiffs or defendants, or other persons, publish notices or advertisements with reference to the subject of a suit, calculated to prejudice the rights, or misrepresent the relative position or character, of any of the parties to the cause. *Matthews v. Smith*, 331

CONTINGENT LEGACY.

See LEGACY, 9.

CONVERSION.

1. Residuary gift of the whole income of the testator's property (which included leaseholds and Long Annuities) to his wife, for her life, at her own disposal, but not to sell without the consent of all parties; remainder to the brothers of the testator equally:—*Held*, that, construing the gift with reference to the other provisions of the will, the widow was entitled to the income of the property for her life, in the state of investment in which it was left by the testator. *Hinves v. Hinves*, 609

2. *Semble*, in the application of the rule for converting into permanent investments, at the death of the testator, perishable property in which he has given interests for life, and other interests in succession, the

inclination of the court in the later cases, when the meaning was doubtful, has been in favor of that construction which would give to the tenant for life the enjoyment of the property in specie. *Hinves v. Hinves*, 609

COPYHOLD.

See ESCHEAT, 1, 2.
RECEIVER, 2.

COPY OF BILL.

1. It is not sufficient that the copy of the bill served under the 24th Order has been examined with the office copy, unless the office copy be proved to have been examined with the engrossment. *Coleman v. Rackham*, 184

2. It is sufficient to state that the copy of the bill served under the 24th Order of August, 1841, is a true copy; and not necessary to show (as in *Penfold v. Bouch*) the manner of examination. *Broughton v. Broughton*, 335

3. Order for leave to enter the service of a copy of the bill under the 24th Order of August, 1841, on the statement at the bar, that the draft, is settled by counsel, contained no prayer for account, payment, conveyance, or other direct relief against the defendant, without requiring an affidavit of that fact, or explanation of the nature of the suit. *Hudson v. Dungworth*, 508

CORPORATION.

See LEGACY, 5.
PENALTIES.

COSTS.

1. The act which enabled a company to purchase and take land for making a railway provided that the costs of the "contracts, sales, and conveyances" should be borne by the purchasers:—*Held*, that the vendors were, under these words, entitled to be reimbursed the costs of making out their title to the land purchased by the company. *Ex parte Feoffees of Addies' Charity, in Re London and Greenwich Railway Company*, 22

2. Under the act enabling the corporation of Trinity House to purchase property, and in certain cases to pay the purchase-money into court, to be laid out in stock for the benefit of the parties entitled, providing that the "costs of the investment of the purchase-money" shall be paid by the corporation, the broker's commission on the purchase of stock is a part of the costs of investment to be borne by the corporation. *In re 6 & 7 Will. 4, Ex parte the Corporation of Trinity House*, 95

3. The Attorney General appearing in support of a bill for a legacy,—the bill being dismissed,—held not entitled to costs. *Gloucester (Mayor, &c.) v. Wood*, 149

4. Costs given to the Bank of England out of a trust fund of government stock, in the suit of the cestui que trusts for the application of the fund according to their interests although the decree was made against the bank,—the bank having acted upon a doubtful construction of a late act of parliament, before that construction had been settled by any judicial determination. *Bristed v. Wilkins*, 235

5. Cases in which costs may be given to a plaintiff, out of an estate, notwithstanding the dismissal of the bill. *Westcott v. Culliford*, 274

6. A relation of the parties entitled to the residue of the estate (if any) obtained an order for opening biddings but did not become the purchaser of the property on the re-sale. The property was sold at an advance beyond the first price added to the deposit. In the special circumstances of the case, the court allowed the person who opened the biddings his costs. *Chapman v. Fowler*, 577

See DISMISSAL OF BILL, 2.
MORTGAGOR AND MORTGAGEE, 2.
STAY OF PROCEEDINGS, 1.

COVENANT.

1. The testator gave the residue of his estate to trustees, upon trust, to divide the same amongst the several persons who were his creditors at the time he executed a certain conveyance for their benefit, their executors and administrators; such payment and provision to be made to and amongst such persons respectively, their respective executors or administrators, rateably and in proportion to the quantum or

amount of the original debt or debts due from him to such person or persons respectively: and if any person or persons claiming under such bequest should not give notice of such claim to the trustees within two years of the testator's decease, such share or shares of the residue to go to certain residuary legatees:—*Held*, that the residue was to be divided into parts corresponding in number and proportion with the original debts. *Philips v. Philips*, 281

2. That the shares attributed to the debts of creditors who died in the lifetime of the testator did not lapse by their death. *Ib.*

3. That the surviving partners were the persons to receive and give receipts for the share of the residue attributed to a joint debt, and that it was necessary, before carrying over the shares in this suit, to inquire into the state of the accounts as between the surviving and the representatives of the deceased partners. *Ib.*

4. That a claim made by the representatives of a partner beneficially interested in a joint debt was a sufficient claim, although such a partner was not the last survivor of the partners in the firm to which the debt was owing. *Ib.*

5. That the share of the residue attributed to a debt, in respect of which no claim was made, belonged to the residuary legatees. *Ib.*

6 That the amount of the residue, whether as exceeding or falling short of the amount of the unpaid debts, did not affect the construction of the will. *Ib.*

7 *Semble*, that the trust must be considered as proceeding upon a mixed principle of bounty and obligation; and that the will must be read as, to some extent, directing payment of debts. *Ib.*

8. *Quære*, as to the construction of such a bequest, if the debts had all been paid in full before the date of the will. *Ib.*

See ADMINISTRATION, 1.
ACCOUNT, 4.
ADMINISTRATION, 1
JUDGMENT CREDITOR.
LEGACY, 14, 15.
PARTIES, 3, 4, 5.
STAT. 1 WILL. 4, c. 60.

CREDITORS' SUIT.

The existence of a creditor's suit for the administration of the estate of a deceased debtor does not prevent the operation of the Statute of Limitations against a debt, in respect of which no claim is made under the decree, *semble*. *Tatam v. Williams*, 347

CROSS BILL.

See PLEA, 4.

CROSS INTERROGATORIES.

See WITNESS.

CROSS REMAINDERS.

See CY PRES, 5.

CUMULATIVE LEGACY.

See SUBSTITUTIONAL LEGACY.

CY PRES.

1. Devise to A., the daughter of the testator, for life, and after her decease to all and every the child or children of A., male or female, begotten or to be begotten, and their assigns, for their respective lives; and after the decease and respective deceases of such child or children of A., to all and every the child or children of all and every such child or children of A., male or female, to be begotten, and the heirs of his, her, and their respective body and bodies, as tenants in common; and in case of the death of any of the said children of such child or children of A., and failure of issue of his, her, or their body or bodies respectively, then as well the original as the accrued share of such of them so dying without issue to go to the survivors and survivor, others or other of them, as tenants in common, if more than one; and for default of such issue, over. A. had three children born in the lifetime of the testator, and living at his decease, and one born after the testator's death. One of the three born in his lifetime died during the life of A. without issue:—*Held*, that the children of A. took as tenants in common,

and not as joint-tenants. *Vanderplank v. King*,

2 That, inasmuch as the children of the after-born child of A. could not take as purchasers, the devise would be supported according to the rule of cy pres or approximation, by giving an estate tail to the after-born child of A. *Ib.*

3. That the rule of cy pres, being an arbitrary principle of construction, introduced to effect the intention of a testator in the exigency of a particular case, was not to be applied, except when the necessity of the case required it; and that therefore, although the devise was to the children of A. as a class, the children of A. born in the testator's lifetime would take estates devised to the children of the after-born child would alone be altered. *Ib.*

4. That cross-remainders were to be implied between the children of A., and therefore that the three children of A. who survived or left issue took, according to their respective estates, the share of the child of A. who died without issue; and that the inequality among the devisees, some of them being tenants in tail, and others tenants for life with remainder to their issue in tail, was no objection to the implication of cross-remainders among them. *Ib.*

DAMAGE.

See INJUNCTION.

DEATH OF LEGATEE.

See STATUTE 1. VICT. C. 26, ss. 3, 24, 33.

DEBT.

See CREDITORS, 1, 2, 5, 6, 7, 8.
EQUITABLE SET-OFF, 2, 3, 4.
JURISDICTION, 5.
SATISFACTION, 1, 2.

DEBTOR AND CREDITOR.

The legal effect of acknowledging a debt barred by the Statute of Limitations is that of a promise to pay the old debt,

which promise the law implies from the acknowledgment, and for which the old debt is a consideration in law; but, if the promise is limited to payment of the old debt in a certain time, or in a particular manner, or out of a specific fund, the creditor can claim nothing more than the promise gives him, for the old debt is revived no further than as a consideration for the new promise. *Philips v. Philips*, 299

See EQUITABLE SET-OFF.

PRINCIPAL AND SURETY.

STAT. 3 & 4 WILL. 4, C. 104.

STAT. 1 & 2 VICT. C. 110, ss. 14. AND 15.

DEBTS UNASCERTAINED.

See ADMINISTRATION, 1.

DECREE.

See ACCOUNT, 1.

CREDITORS' SUIT.

JURISDICTION, 1, 2, 4.

SUPPLEMENTAL BILL, 2.

DEEDS.

See DISCOVERY.

DEMISE.

See ESCHEAT.

DEMURRER.

1. The plaintiff cannot, on demurrer, sustain the bill by waiving the relief prayed against the demurring defendant. *Griffith v. Ricketts*. 476

2. Where, consistently with the statements in a bill of revivor, the defendant might have been made a party either to receive or pay what was due to her from the estate of which she was the representative, or to account for her own receipts, but it did not appear whether she was a party for any of such purposes, or in what character she was brought before the court, her demurrer was allowed. *Ib.*

See JURISDICTION, 1.
PARTNERSHIP, 2.
PLEADING, 4, 5, 6.

DEVISE.

See MISTAKE.

DEVISEE.

See DISCOVERY.

DISCLAIMER.

See EVIDENCE, 2.

DISCOVERY.

Bill of discovery in aid of an ejectment by a plaintiff, claiming as heir-at-law against the devisees of a feme covert, alleging the absence of any power of appointment in such feme covert, or that it was never duly exercised by her. The only issue raised on the pleadings being on the validity of the appointment by the devisee, the plaintiff was held not to be entitled to the production of the deeds, under which the defendants alleged, that the power of appointment was given to their devisor, although it appeared, that, by such deeds, the estate was limited to her heirs and assigns, in default of appointment. *Bennett v. Glossop*, 578

See PLEA, 3, 4.
PRODUCTION OF DOCUMENTS.
STAY OF PROCEEDINGS, 5.

DISMISSAL OF BILL.

1. Reasons for not declaring the dismissal of the bill to be without prejudice to another suit. *Gloucester (Mayor &c.) v. Wood*, 148

2. On the motion to dismiss the bill for want of prosecution, under the 16th and 17th (amended) Orders of 1828, the court will not enter into the merits of the cause to determine whether the bill should be dismissed without costs; but will, with reference to the question whether the common order should be made, consider only the conduct of the parties in the cause in

respect to its prosecution. *Stagg v. Knowles*, 241

See COSTS, 5.
STAY OF PROCEEDINGS, 4.

DIVIDENDS.

See STATUTE 4 & 5 WILL. 4, c. 22.

DOWER.

1. The testator devised all his real estate to a trustee upon trust for sale, with power to convey the same to purchasers without the concurrence of any person or persons beneficially claiming under his will; and he directed the trustee to stand possessed of the proceeds of such sale, together with the residue of his personal estate, upon trust to pay one moiety of the interest and dividends thereof to his wife during her widowhood, and the other moiety of such interest and dividends (and the whole after his wife's decease or second marriage) to his sister for her life; with remainder, as to the whole of the trust funds, to the children of the testator's sister for their lives and the life of the survivor; remainder over. The widow of the testator was dowable of part of the real estate:—*Held*, that the widow was entitled both to her dower and to the benefit given to her by the will. *Ellis v. Lewis*, 310

2. Where the devise of land is in trust for sale, the mode of applying the proceeds does not affect the question, whether the widow is entitled to her dower, or is put to her election. *Ib.* 319.

See ELECTION.

EQUITABLE ASSIGNMENT.

See ASSIGNMENT.

EQUITABLE MORTGAGE.

See MORTGAGE, 2.

EQUITABLE SET-OFF.

1. A share of rent due from the occupy-

ing tenant of certain premises to the estate of a testatrix, who was one of several tenants in common of the same premises, allowed to be set off by her executors in a suit for a legacy bequeathed by the testatrix to the debtor; but not as against a legacy bequeathed by the testatrix to the wife of the debtor. *Mac Mahon v. Burchell*, 97

2. In a suit by a legatee to obtain payment of the legacy out of the assets of the testator, in a due course of administration:—*Held*, that the executor might retain so much of the legacy as was sufficient to satisfy a debt due from the legatee to the testator, at the time of his death, although the remedy for such debt was, at the time of the death of the testator, barred by the Statute of Limitations, 21 Jac. 1, c. 16. *Courtenay v. Williams*, 539

3. Whether the executor would have had the same right of retainer if the suit had been for payment by himself personally, and not out of assets of the testator—*quære*. *Ib.*

4. A. was indebted on bond to B. B. died, leaving C. his sole next of kin, who obtained letters of administration of his estate. The estate of B., after all debts, &c. were paid, left a clear residue exceeding the amount of the bond debt. A. became surety for C. by joining in promissory notes. C. became an insolvent debtor, and A. was compelled to pay the notes. C. died, and then the assignee under his insolvency took out letters of administration *de bonis non* of B., and sued A. on the bond:—*Held*, that A. might set off the sums which he had been compelled to pay as surety for C. against the bond debt. *Jones v. Mossop*, 568

5. The obligor in a bond, becoming surety for advances to the obligee, and being, after the insolvency of the obligee, compelled to pay the debt for which he had become surety, is entitled to set off the sum so paid against the amount due upon the bond. *Ib.*

See ACCOUNT, 2.

EQUITY OF REDEMPTION.

Distinction between an equity of redemption and a mere trust. *Viscount Downe v. Morris*, 404

ESCHEAT.

1. The lord of a manor taking by escheat, on the death of a tenant without heirs, the fee-simple of lands holden of the manor, but subject to a demise by way of mortgage for a term of years created by the tenant, is entitled in equity, as against the mortgagee, to redeem the term. *Viscount Downe v. Morris*, 394

2. If the lord, taking lands by escheat, on the failure of heirs of his tenant, is liable, under the statute 3 & 4 Will. 4, c. 104, out of such lands to pay a mortgage debt of the tenant charged thereon, he is entitled to redeem the lands, and get in the securities which the creditor held for the debt. *Ib.*

ESTATE-TAIL.

See CY PRES, 3.

EVIDENCE.

1. Letters proved, but not particularly mentioned in the pleadings, are not therefore inadmissible; but if the production of such evidence would operate as a surprise on the other party, the court will not give effect to it, without giving the party to be affected by it an opportunity of controverting it. *Malcolm v. Scott*, 39

2. Circumstances under which the answer or disclaimer of one defendant may entitle the plaintiff to a decree in the cause, as against another defendant, although the answer or disclaimer of one defendant is not evidence against the other. *Green v. Pledger*, 165

3. Evidence on which the Court might decree the specific performance of an alleged agreement, according to one construction of a writing which was of doubtful meaning, where a conveyance, according to a different construction, had been executed by the vendor, and accepted by the purchaser. *Humphries v. Horne*, 277

4. It being admitted, or proved, that advances had been made by the testator to the legatee:—*Held*, that cheques drawn by the testator on his bankers, in favor of, and paid by them to, the legatee, were evidence on the question of the amount of such advances and that an admission of

a debt to the testator, made by the legatee in his balance-sheet, and examination under his bankruptcy, (though it did not charge himself so as to take the debt out of the Statute of Limitations,) was evidence of the character of the advances which had been made, on the question, whether such advances were loans or gifts. *Courtenay v. Williams*, 539

5. *Semble*, an examined copy of a letter of attorney, inrolled in the office of record in Jamaica, is not admissible in evidence (without more :) although an examined copy of a deed so inrolled is, by force of acts of the local legislature, admissible. *Faulkner v. Daniel*, 221

See ADEPTION, 2.
SATISFACTION, 3.

EXAMINATION IN BANKRUPTCY.

See EVIDENCE, 4.

EXCEPTIONS.

Leave to amend the bill, without prejudice to exceptions to the answer which had been over-ruled. *Woods v. Woods*. 411

See PARTNERSHIP, 2.
PRO INTERESSE SUO.

EXECUTOR AND ADMINISTRATOR.

The administrator under a limited administration, granted by the proper Ecclesiastical Court, represents the estate of the deceased to the extent of the authority conferred by the letters of administration ; but if the administration granted be more limited than the purposes of the suit require, and it is in the power of the plaintiff to obtain a more general administration, the court may require him to do so. *Faulkner v. Daniel*, 207

See ACCOUNT, 4, 5.
EQUITABLE SET-OFF, 2, 3, 4.
LEGACY, 8, 11.

FAMILY.

The testator bequeathed several lega-
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cies, and, among others, to S. W. 14,000*l.*, "and to the latter gentleman's family 6000*l.*" S. W. had six children, all living at the date of the testamentary instrument, and at the death of the testator, and no other issue:—*Held*, that such six children were, as joint tenants, exclusively entitled to the legacy of 6000*l.* *Wood v. Wood*. 65

See ALIENATION.

FERRY.

See PENALTIES.

FORECLOSURE.

See MORTGAGE, 1.

FOREIGN COURT.

See JURISDICTION, 3.

FORFEITURE.

See ALIENATION.

FRAUD.

See INFANT.
PLEADING, 6.

FRAUDULENT CONVEYANCE.

See PRO INTERESSE SUO.

GENERAL ORDERS.

XVI. (Amended) of 1828.

See DISMISSAL OF BILL, 2.

XVII. *Id.*—See DISMISSAL OF BILL, 2.

XVI. of August, 1841.—See ANSWER.

XVII. *Id.*—See ANSWER.

XXI. *Id.*—See ANSWER.

XXIII. *Id.*—See COPY OF BILL.

XXIV. *Id.*—See COPY OF BILL.

XXXVIII. *Id.*—See PARTNERSHIP, 2.

XL. *Id.*

To a bill to enforce payment of a legacy charged on real and personal estate, the heir-at-law of the survivor of the trustees appointed by the testator, and the personal representative of the testator, should properly be parties; but the defendants not having, by plea or answer, objected that such heir or personal representative were necessary parties, the court, under the 40th Order of August, 1841, in the circumstances of the case, make a decree saving their rights. *Faulkner v. Daniel*, 199

XLIX. *Id.*—See PLEADING, 1.

HEIR-AT-LAW.

See DISCOVERY.

STAT. 4 & 5 WILL. 4, c. 22.

HUSBAND AND WIFE.

See ADEMPION, 3.

ALIENATION.

EQUITABLE SET-OFF, 1.

FAMILY.

SEPARATE USE.

INFANT.

Payment by a trustee to an infant cestui que trust, nineteen years of age, on the false representation by herself and her parents, that she had attained the age of twenty-one, held to be a discharge to the trustee for the sum so paid; but a release executed by the infant to the trustee of all demands in respect of the trust, held not to be a bar to a suit by the same cestui que trust against the trustee, although such suit was not brought until seven years after the cestui que trust had attained twenty-one. *Overton v. Banister*. 503

See MORTGAGOR AND MORTGAGEE, 1.

INJUNCTION.

1. The pendency of proceedings before the Judge at chambers to settle the pleas to the action is no ground for varying the

form of the order for extending the common injunction to stay trial. *Woodall v. White*. 411

2. That, where the opinion of the court was not clearly for or against the plaintiff, it would be governed by the balance of inconvenience, on either side in granting or refusing the injunction; and where the damage to the plaintiff was shown to be small in amount, the Court would not prejudice the legal question by granting the injunction, but would require an account to be kept pending the trial at law. *Cory v. Yarmouth and Norwich Railway*. 593

See CONTEMPT.

JURISDICTION, 2.

PARTIES, 2.

PENALTIES.

PRINCIPAL AND SURETY.

RECEIVER, 2.

SPECIFIC CHATTELS.

INQUIRIES.

After several references to the master, and after the cause had been argued and judgment given on further directions, the Court refused to stay the distribution of the fund and direct a further reference with respect to a new case as against certain creditors, which case it did not appear that the parties might not have previously brought forward, and which was not proved by the evidence adduced. *Philips v. Philips*, 301

INSOLVENT DEBTOR.

1. An insolvent debtor cannot, on the mere allegation that the assignee in the insolvency colludes with a debtor to the estate, and refuses to sue, sustain a suit for a legacy which passed by the assignment of his estate and effects under the insolvency, although charging that the legacy, if recovered, will afford a balance after satisfying all his debts; and praying that the legacy may be paid either to the assignee or to himself; nor can the suit be sustained, even if the provisional assignee appear, and submit to be bound by the decree; for the provisional assignee cannot empower another party to sue for the insolvent's estate, except by allowing such other party to sue in his (the assignee's) name. *Major v. Auckland*. 77

2. Whether, if the alleged collusion or

refusal to sue were proved, the insolvent could sustain such a suit—*quære?* *Ib.*

See EQUITABLE SET-OFF, 4, 5.

INTEREST.

See STAY OF PROCEEDINGS, 1.
VENDOR AND PURCHASER.

INTERROGATORIES.

See SUPPLEMENTAL BILL, 2.
WITNESS.

INVESTMENT.

See ADMINISTRATION, 2, 3.
CONVERSION, 1, 2.
COSTS, 2.
VENDOR AND PURCHASER.

IRREGULARITY.

See APPEARANCE.

ISSUE.

See CONSTRUCTION, 1, 2.
LEGACY, 12.
STAT. 3 & 4 WILL 4, c. 27.
STAT. 1 VICT. c. 26, ss. 3, 24, 33.

JOINT STOCK COMPANY.

The plaintiffs, who claimed as trustees of a dissolved banking company, and were proved to have been partners in the company, *held* entitled to sustain a suit, as representing the company, against a defendant who had been in the habit of transacting business with the company, and had dealt with the trustees in that character, and by his answer to the suit made no positive suggestion that the plaintiffs did not sufficiently represent the company. *Gordon v. Pym*, 223

See PARTIES, 8.

JOINT TENANCY.

Severing joint tenancy. *Wood v. Wood*, 67

See CY PRES, 2.
TENANCY IN COMMON.

JUDGMENT CREDITOR.

An equitable mortgagee of lands is entitled in equity to enforce his charge in priority to a creditor of the mortgagor, who, without notice of the equitable mortgage, has, subsequently thereto, recovered judgment against the mortgagor, and obtained actual possession of the lands by writ of elegit and attornment of the tenants. *Whitworth v. Gaugain*, 416

See STAT. 1 & 2 VICT. c. 110, ss. 14, 15.

JURISDICTION.

1. The next of kin of an intestate filed their bill in equity in the Supreme Court of Newfoundland, against A., the brother and deceased partner of the intestate, for an account of the estate of the father of A., and of the intestate, possessed by A., and on account of the partnership transactions, and the dealings of A. with the estate since the death of the intestate. The bill was taken, pro confesso, against A. in the Colonial Court, and, on a reference, the Master reported that certain sums were due to the several next of kin on account of the estate of the intestate's father possessed by A.; but that no account between A. and the intestate had been laid before him: the Supreme Court decreed that the sums found by the Master to be due to the next of kin and the costs should be paid to them by A. The next of kin brought their actions in this country against A. upon the decree. A. then filed his bill in this court against the next of kin and personal representative of the intestate, stating that the intestate's estate was indebted to him on the partnership accounts, and on private transactions; alleging various errors and irregularities in the proceedings in the Supreme Court, and that A. intended to appeal therefrom to the Privy Council; and praying that the estate of the intestate might be administered, the partnership accounts taken, the amount of the debt due to A. ascertained and paid, and the next of kin restrained by injunction from proceeding in their actions. *Henderson v. Henderson*, 100

Demurrer, for want of equity, allowed on the ground that the whole of the matters were in question between the parties,

and might properly have been the subject of adjudication in the suit before the Supreme Court of Newfoundland. *Henderson v. Henderson*, 100

2. That, inasmuch as the Privy Council is the court of appeal from the colonial court, and has jurisdiction to stay the execution of the decree pending the appeal, the court will not interfere by injunction, on the ground of error or irregularity in the decree of the colonial court. *Ib.*

3. Whether, in a case of error shown in the judgment of the court of a foreign country, from which there was no appeal to any of her Majesty's courts, the decision would be the same—*quære?* *Ib.*

4. The court having interfered by injunction to restrain the payment of a legal debt, admitted by the debtor to be due to the nominal creditor, has then jurisdiction to decree payment of the debt against the debtor, without sending the party entitled to the payment to recover it by the use at law of the name of the nominal creditor. *Green v. Pledger*, 165

See CO-DEFENDANTS.
PARTNERSHIP, 2.
PENALTIES.
SPECIFIC CHATTELS

LAPSE.

See CONSTRUCTION, 2.
CREDITORS, 2.
STAT. 1 VICT. c 26, ss. 3, 24, 33.

LAPSE OF TIME.

See LEGACY, 13.
PARTNERSHIP, 1.

LEAVE OF COURT.

See SERVICE.

LEGACY.

1. The testator, by his will, gave to his executors beneficially all his property which he might not dispose of, subject to his debts and any bequests which he might afterwards make; and made a codicil of a

later date in these words:—"In a codicil to my will, I gave the corporation of Gloucester 140,000*l.* In this, I wish my executors would give 60,000*l.* more to them for the same purpose as I have before named." No other codicil was found containing any bequest to or mention of the corporation. On a bill by the corporation against the executors and the Attorney-General, for payment of the 140,000*l.* and 60,000*l.*, and to have the interest of the corporation therein declared:—*Held*, that the purpose of both legacies must be deemed to have been the same, and to have been expressed in the codicil referred to, as giving the first legacy. *Gloucester (Mayor, &c.) v. Wood*, 131

2. That, in construing the codicil, the court must exclude from its consideration the proceedings before the Ecclesiastical Court, on the question of the admission to probate of the will and codicil. *Ib.*

3. That the plaintiffs must be regarded as admitting, in the suit, that no other circumstances proper for the consideration of this court, as affecting the claim of the corporation to the legacies, were known. *Ib.*

4. That a bequest of a legacy to an individual for a purpose expressed elsewhere, and which purpose, from some unexplained cause, is unknown to the court, creates such an uncertainty, that a court of construction cannot declare the intention of the testator. *Ib.*

5. That, although it was improbable that the legacies to the corporation were given in trust for a private person, yet there being no legal presumption that such was not the purpose referred to, the court could not presume that, because the legatee was a corporation, the legacy was therefore upon a charitable trust to which uncertainty of object would be no objection. *Ib.*

6. That the proposition that the court does not presume, and that merely precatory words do not create, a trust, supposes the whole intention of the testator, so far as it had been committed to writing, to be before the court, and that the uncertainty is occasioned by the intention which is declared; and does not apply to a case in which, from the terms of the bequest, it would appear that there was a written expression of the intention of the testator which is not before the court, and the uncertainty is occasioned by the absence of that written declaration, *Ib.*

7. That it being the duty of the executors to protect the interests of the residuary legatees against the claims of other persons on the estate, the circumstance that the executors were also residuary legatees, was immaterial to the case. *Gloucester (Mayor, &c.) v. Wood*, 131

8. Whether, if the plaintiffs, on the construction of the codicil which was proved, would have been held entitled to the legacies, the court would not,—before it treated the absence of the missing codicil as evidence of revocation of the legacies,—have inquired into the circumstances relating to that absence—*quære?* *Ib.*

9. The testator, by his will, charged his debts and legacies upon his real and personal estate, and gave such real and personal estate to trustees upon trust for his nephew for life, (to whom also he gave a legacy,) with remainder to the first and other sons of the nephew successively in tail male, with remainder to the second and every other son of the testator's brother successively, in tail male, remainder of the testator's own right heirs; and added—"and upon this last-mentioned contingency, failing heirs male of my said brother, and of my said estate going to my right heirs more remote as aforesaid, then I do hereby charge, subject, and make liable my said estate with the payment of the sum of 5000*l.* to my niece." The testator died in 1775, leaving his brother his heir-at-law. The nephew entered into possession of the real estate, which consisted of a plantation in Jamaica, subject to a mortgage created by the testator in 1765. The brother afterwards died, leaving the nephew, his only son and then heir-at-law of the testator: the nephew died in 1822, without issue male. The bill was filed in 1837 against the mortgagees and the devisees of the nephew to obtain payment of the niece's legacy of 5000*l.*:—*Held*, that, on the death of the nephew without issue male, the event happened on which the niece would become entitled to the legacy of 5000*l.*; and that it was not too remote. *Faulkner v. Daniel*, 199

10. That the nephew was only bound in his lifetime to keep down the interest of the debts and legacies; and that he was entitled to keep on foot, as subsisting charges against the real estate, the principal of the debts and legacies paid off by him, and also his own legacy. *Ib.*

11. That an administrator of the nephew, to whom letters of administration had been granted limited to the purposes of the suit,

was a sufficient representative of the personal estate of the nephew in the cause. *Faulkner v. Daniel*, 199

12. Devise of real estate to A. for life, subject to the payment of 2000*l.* a-piece to B., C., and D., or to their respective lawful issue, twelve months after the death of the testator, and devise of the same estate in remainder, on the death of A., to his children as he should appoint, charged with a further sum of 3000*l.* a-piece to B., C., and D., or to their respective lawful issue. B., C., and D., survived the testator. B. died, without issue, in the lifetime of A., and C. and D. died in the lifetime of A., leaving issue:—*Held*, that the legacies to B., C., and D., vested in the legatees, subject to be divested in favor of their children, in case of their death, leaving children; and, therefore, that B. took both the legacies absolutely, and C. and D. took the legacies of 2000*l.* each, absolutely, and the children of C. and D. took the legacies of 3000*l.* by substitution for their parents. *Salisbury v. Petty*, 86

13. Legatees whose legacies were charged on real estate, subject to prior charges, not affected by lapse of time so long as any of the prior charges subsisted. *Faulkner v. Daniel*, 212

14. Different construction of a bequest to persons who had been creditors, but had been paid in full, where the payment had been made before, and where after, the date of the will. *Philips v. Philips*, 298

15. Whether the right of a creditor to a share of the residue would not be sustained, if the principal of his debt had been paid, but he had not received interest upon the debt for the time that the payment was delayed—*quære?* *Id.* 303

16. Raising legacy out of real estate. *Salisbury v. Petty*, 94

See ADEMPTION, 1, 2, 3, 4.

CONSTRUCTION.

COSTS, 3, 5.

CREDITORS, 1, 2, 7, 8.

EQUITABLE SET-OFF, 2, 3.

FAMILY.

LEGATEE.

See APPORTIONMENT.

STAT. 1 VICT. c. 26, ss. 3, 24, 33.

LEGATEES' SUIT.

See ACCOUNT, 3, 5.

LETTER OF ATTORNEY.

See EVIDENCE, 5.

LIEN.

See ASSIGNMENT.
PLEA, 3, 4.

LIMITED ADMINISTRATION.

See EXECUTOR AND ADMINISTRATOR.
LEGACY, 11.

LIS PENDENS.

See PARTIES, 6.
TRUSTEE.

LORD OF MANOR.

See ESCHEAT.
RECEIVER, 2.

MAINTENANCE.

See ALIENATION.

MISTAKE.

A testator devised his freehold estate to his widow, charged with a legacy to another, and also bequeathed to his widow his personal estate. The widow, by her will, gave a leasehold estate, part of the same property (erroneously describing it as freehold,) to A., subject, in conjunction with the freehold premises, to the legacy; and she devised the freehold premises to B., subject, with the premises devised to A., to the payment of the same legacy:—*Held*, that the fact of the testatrix having given the estates to A. and B. respectively in the mistaken supposition that both the estates were, under the will of the original testator, subject to the legacy, but which he had charged on the freehold only, was no ground for exonerating the estate bequeathed to A., or there was no reason to pre-

sume that the testatrix would have apportioned her bounty differently if the mistake had not occurred. *Westcott v. Culliford*, 265

MORTGAGE.

1. The mortgagee of a reversionary interest in stock in the public funds, with a power of sale, may bring forth his bill for foreclosure; and is entitled to a decree in the common form for an account, and, in default of payment, for foreclosure. *Slade v. Rigg*, 35

2. An equitable mortgagee of lands is entitled in equity to enforce his charge in priority to a creditor of the mortgagor, who, without notice of the equitable mortgage, has, subsequently thereto, recovered judgment against the mortgagor and obtained actual possession of the lands by writ of elegit, and attornment of the tenants. *Whitworth v. Gaugain*, 416

See ESCHEAT.

MORTGAGOR AND MORTGAGEE.

1. A., seised in fee, mortgaged for a term of years, and afterwards devised the mortgaged premises, and died. The mortgagee brought his bill against the devisees, some of whom were infants, for foreclosure:—*Held*, that the defendants, during the infancy of the devisees, were not entitled to a decretal order on motion, under the stat. 7 Geo. 2, c. 20, s. 2, or under the general jurisdiction of the court, to take an account of what was due. *Taylor v. Coates*. 263

2. The mortgagee or incumbrancer, consenting to a sale of the mortgaged premises in an administration suit, does not thereby waive his right to be paid his principal, interest, and costs out of the monies produced by the sale, in priority to the costs of the plaintiffs in the cause. *Hepworth v. Heslop*. 485

See CONSIGNEE.

ESCHEAT.

PARTIES, 1, 3, 4.

PRINCIPAL AND AGENT.

SUPPLEMENTAL BILL, 2.

MOTION.

See MORTGAGOR AND MORTGAGEE, 1.
STAT. 3 & 4 Will. 4, c. 27.

NEXT OF KIN.

See TENANCY IN COMMON.

NOTE AT FOOT OF THE BILL.

See ANSWER.

OFFICIAL ASSIGNEE.

In suits by or against the assignees of a bankrupt, where the bankruptcy took place and the suit was instituted before the statute directing the appointment of official assignees, and no official assignee is a party to the suit,—at the hearing any of the parties are entitled to an inquiry whether an official assignee of the bankrupt's estate has been appointed. *Tatam v. Williams.*

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OPENING BIDDINGS.

See CORRS, 6.

PARTIES.

1. Trustees appointed to sell a reversionary interest in stock, and pay off a mortgage thereon, and hold the surplus for the mortgagor, are not necessary parties to a bill of foreclosure brought by the mortgagee. *Slade v. Rigg,*

35

2. An injunction to restrain a defendant from parting with the property in question in the cause may be granted, notwithstanding a principal party interested is out of the jurisdiction. *Malcolm v. Scott,*

39

3. W., E., and J., mortgaged their interests under a residuary gift to B. as a security for the debt of W.; and E. and J. took a second mortgage on W.'s interest to indemnify them against the consequences of their joining in the first mortgage. Afterwards W. assigned his interest in the same property to three trustees for certain scheduled creditors. On a bill by E. and J. against B., to redeem the mortgaged property:—*Held*, that the creditors named in the schedule were necessary parties, and were not sufficiently represented by the two surviving trustees alone. *Holland v. Baker,*

68

4. That the circumstance that the trustees were parties, not only in that character, but also as being themselves creditors, did not render them sufficient representatives of the absent creditors, who were fifty-four in number; and especially, inasmuch as one of the trustees had also another and distinct mortgage on the equity of redemption. *Ib.*

5. That the defect of parties was not supplied by a supplemental suit, bringing before the court a few of the other creditors, to which supplemental bill the trustees were not parties. *Ib.*

6. A suit was instituted to administer and ascertain the residue of an estate, and one of the residuary legatees, after the bill was filed, and before he was served with the subpoena to appear and answer, assigned his share: the assignee was held to be a necessary party to the suit. *Humble v. Shore,*

119

7. To a bill to enforce payment of a legacy charged on a real and personal estate, the heir-at-law of the survivor of the trustees appointed by the testator, and the personal representative of the testator, should properly be parties; but the defendants not having, by plea or answer, objected that such heir or personal representative were necessary parties, the court under the 40th Order of August, 1841, in the circumstances of the case, made a decree saving their rights. *Faulkner v. Daniel,*

199

8. A few of the partners in a company consisting of more than one hundred and fifty persons, *held* entitled to sue on behalf of the whole, to recover a debt due to the company. *Gordon v. Pym.*

223

See APPORTIONMENT, 2.

INSOLVENT DEBTOR, 1.

OFFICIAL ASSIGNEE.

PARTNERSHIP.

1. Bill by surviving partners, against the executors of a partner who had died thirteen years before the institution of the suit, for an account of the partnership dealings and transactions, charging that the deceased partner was indebted to the firm at the time of his death,—dismissed with costs, on the ground of the lapse of time, no new liabilities of the former partnership appearing to have arisen, or become known, after the death of the deceased partner. *Tatam v. Williams,*

347

2. A bill for a partnership account and a receiver, during the existence of the partnership, is not demurrable merely on the ground that a dissolution is not prayed; and, therefore, where, to a bill by one partner against another, alleging that the defendant, by conducting himself in violation of the partnership contract, excluding the plaintiff, and applying the assets to his own use, sought to force the plaintiff to dissolve the partnership before the end of the term, and praying an account of the partnership transactions and a receiver, but no dissolution, the defendant answered one interrogatory, and, submitting that the bill was demurrable, declined, under the 38th Order of August, 1841, to answer the remainder,—exceptions for insufficiency were allowed and sustained. *Fairthorne v. Weston*, 387

3. Articles of partnership provided, that, on the 31st of December in every year, or such other day as all the partners should agree upon, a general partnership account and rest, and a valuation and appraisement of the property and stock should be made, and signed by the partners, and, on the expiration of the partnership term, the partnership property should be realized and divided on the footing of such last annual rest; and, if any partner should die during the partnership term, his representatives should receive payment of his share of the capital and stock, as ascertained at the last annual rest, with interest thereon, (in lieu of profits from that time,) by instalments; and such representatives to have no right to look into the partnership books. The partnership continued for several years, but the partners did not make the annual account and rest as provided by the articles. One partner died:—*Held*, that the representatives of the deceased partner were not entitled to a sale of the partnership property, as upon a dissolution; that the rest, and not the day of the rest, was the essence of the partnership contract; and, therefore, that the representatives of the deceased partner were entitled to participate in the profits up to the time of his death; and, also, to have the account taken, by means of the partnership books, in the usual way. *Simmons v. Leonard* 581

4. By an agreement between some of the partners in a colliery, reciting, that it was apprehended it would be competent for one partner to determine the joint interest and bring the partnership property to sale, and that the death of any partner would have that effect; and that they were desirous that their interests should be

so far several, that the share of any partner should be transmissible to his representatives, and that the partnership interest should not be determined, and the entire property sold, without the consent of the majority in value, but each should be competent to sell his own share only; it was agreed that each of them should hold to himself, transmissible to his own representatives or assigns, an aliquot share of certain of the partnership property, and that their joint holding should not be subject to the ordinary terms applying to partnership property so as to entitle any one of them to a sale without the concurrence of such majority, or to dissolve the partnership, or so as to cause a total dissolution of partnership by the death of any one of them:—*Held*, that this was not an agreement by the parties that the representatives of a partner, after his death, should continue partners with the survivors, and contribute to the working of the colliery on their joint account; but was only an agreement that none of the partners or their representatives should be entitled to a sale of more than his own share of the partnership property. *Tatam v. Williams*, 347

See CREDITORS, 3, 4.
PARTIES, 8.
PLEA, 2.

PAYMENT OUT OF COURT.

See STAY OF PROCEEDINGS.

PENALTIES.

1. The owner of a ferry obtained an act of Parliament enabling him to build a bridge instead of a ferry, and to take tolls thereon; and enacting, that any person who should evade the payment of the tolls by conveying, or assisting to convey, passengers, &c. across the river, within the limits of the ferry, otherwise than by the bridge, should forfeit and pay 40s. for every such offence, to be recovered in a summary way before a justice of the peace, and levied under a warrant to be issued by such justice; and that one moiety of such penalty should be paid to the informer, and the other to the owner of the bridge; and that, where no sufficient distress was found, the offender might be committed for non-payment of such penalty; and that any party aggrieved might appeal from any order of a justice, under the act, to the quarter sessions, but no order or proceedings in

the execution of the act should be removed by certiorari or any other suit or process to any court of record at Westminster. On a motion to restrain a railway company, whose terminus was within the limits of the ferry, from conveying railway passengers across the river in steam-boats:—*Held*, that, although the act which substituted the bridge for the ferry gave the owner of the bridge no right of action against persons evading the tolls, yet, if he were entitled to recover penalties against offenders under the act, *de die in diem*, the court would protect him by injunction from the infringement of his right. That, as no action could be brought, under the act, by the plaintiff, against the railway company, in respect of the alleged wrong, the court would not simply leave the plaintiff to proceed by distress, in order that his legal right might be tried in replevin, but would direct an issue to try such right, and require the defendants not to raise any objection at law on the ground that the alleged wrong was ~~done by a corporation~~. *Cory v. The Yarmouth and Norwich Railway Company*, 593

PLAINTIFF.

See ADMINISTRATION, 2.
Costs, 5.

PLEA.

1. A plea of no partnership to a bill for a partnership account is defective in substance, if not supported by an answer to allegations in the bill, which, if true, would establish the partnership. *Harris v. Harris*, 450

2. To a bill for a partnership account by the representatives of an alleged partner against the survivor, suggesting a pretence by the defendant that no partnership existed, and charging that the defendant was in possession of documents by which the fact of the partnership alleged by the bill would appear, the defendant pleaded no partnership, and supported his plea by an answer to the alleged facts, but did not answer as to whether he was in possession of documents showing the truth of the bill:—*Held*, that the defendant, for the purpose of the argument of the plea, must be intended to admit that he had in his possession evidence which would prove the partnership; and that the plea must therefore be overruled. *Ib.*

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3. An agreement in writing for the sale of an estate by a father to his son expressed a money consideration; but the conveyance of the estate expressed the consideration of natural love and affection. To a bill by the son for a discovery of the conveyance, a plea of the agreement in writing, and that the purchase-money had never been paid or released, was held, under the circumstances, to be defective, in not averring that the money was due. *Drake v. Drake*, 523

4. Bill of discovery in aid of an action of ejectment. Plea, that the plaintiff had contracted to purchase the estate, and that the defendant had a lien on it for the unpaid purchase-money. *Semble*, that the plea is no defence to the discovery; but that the proper mode of protecting the equitable interest of the defendant is by a cross-suit for relief. *Ib.*

PLEADING.

1. The 49th Order of August, 1841, does not dispense with the necessity of stating, in a bill of revivor, so much of the pleadings in the original suit as is sufficient to show the title of the plaintiff, as against the defendant, to revive the suit. *Griffith v. Ricketts*, 476

2. If the statements in the bill of revivor do not show a title to revive, the plaintiff cannot on demurrer supply the defect by reading the record of the original bill, although that record be referred to in the bill of revivor. *Ib.*

3. The title to revive the suit against the defendant is not shown by the mere statement, that such defendant is the representative of a party who had answered the original bill. *Griffith v. Ricketts*, 476

4. The plaintiff cannot, on demurrer, sustain the bill by waiving the relief prayed against the demurring defendant. *Ib.*

5. Where, consistently with the statements in a bill of revivor, the defendant might have been made a party either to receive or pay what was due to her from the estate of which she was the representative, or to account for her own receipts, but it did not appear whether she was a party for any of such purposes, or in what character she was brought before the court, her demurrer was allowed. *Ib.*

6. A general charge of fraud is to be referred to, and explained by, the particular allegations of fraud which the bill contains; but, if there be no definite or specific charge of fraud, a vague charge—where the facts alleged may or may not amount to a fraud—will not sustain the bill upon demurrer. *Munday v. Knight*, 497

See EVIDENCE, 1, 2.
INSOLVENT DEBTOR, 1.
PARTIES, 1, 3, 4, 5, 6, 7, 8.
PARTNERSHIP, 2.
SUPPLEMENTAL BILL.

PORTION.

See SATISFACTION, 1, 4.

POSSESSION.

See CONSTRUCTION, 1.

POWER.

See TRUSTEE.

POWER OF SALE.

See MORTGAGE, 1.

PRACTICE.

See ACCOUNT, 1, 3, 4, 5.
ANSWER.
APPEARANCE.
CONSIDERATION.
CONTEMPT.
COPY OF BILL.
DISMISSAL OF BILL.
EXCEPTIONS.
GENERAL ORDERS.
INJUNCTION.
INQUIRIES.
PARTIES, 2, 6.
PRO INTERESSE SUO.
SERVICE.
STAY OF PROCEEDINGS.
SUBSTITUTED SERVICE.
SUPPLEMENTAL BILL, 2.
TAKING BILL OFF THE FILE.
WITNESS.

PRESUMPTION.

See MISTAKE.

PRINCIPAL AND AGENT.

A banking company, who were mortgagees of certain Spanish bonds, employed the defendant to raise money upon them by deposit in his own name: the party with whom the defendant deposited them called on the defendant for re-payment, and, on default, sold the bonds, with the concurrence of the defendant, without the knowledge of the company, and paid the balance of the proceeds to the defendant. The company was afterwards compelled by their mortgagor to replace the bonds or their value:—*Held*, that the defendant was answerable to the company for the market price of the bonds at the time of the actual sale, and that he was not answerable for the value of the bonds at any other time. *Gordon v. Pym*. 223

See SPECIFIC CHATTELS.

PRINCIPAL AND SURETY.

1. A creditor took, as security for his debt, bills of exchange drawn and indorsed by a surety, and accepted by the principal debtor. After those bills were dishonored, the creditor drew accommodation bills on, and which were accepted by, the principal debtor, but were paid by the drawer when at maturity. On a bill filed by the surety, to restrain an action subsequently brought against him on the bills which had been dishonored, the court allowed the action to proceed, but stayed execution. *Mackintosh v. Wyatt*. 562

2. Whether the surety was discharged by the subsequent transactions which, without his knowledge, took place between the creditor and the principal debtor—*quære?* *Id.*

See EQUITABLE SET-OFF, 4.

PRIVILEGED COMMUNICATIONS.

See PRODUCTION OF DOCUMENTS.

PRODUCTION OF DOCUMENTS.

1. Upon a motion that the defendant

might produce documents in the schedule to his answer—*Held*, that written communications which passed between the defendant and his solicitor before any dispute had arisen between the parties to the suit were privileged, so far as they contained legal advice or opinions, but not otherwise,—although relating to the matters which formed the subject of the suit. *Walsingham (Lord) v. Goodricke, Bart.* 122

2. There is no essential difference, with respect to the privilege of professional confidence, between cases stated for the opinion of counsel, and other communications. *Ib.*

PROFESSIONAL CONFIDENCE.

See PRODUCTION OF DOCUMENTS.

PROFITS.

See PARTNERSHIP, 3.

PRO INTERESSE SUO.

1. A defendant, being in contempt for non-payment of money, executed a conveyance of his real estate to his son, and the son entered into possession under the conveyance. Some months afterwards, a sequestration issued against the defendant founded on the same contempt, and the sequestrator took possession of the estate. The defendant's son was examined pro interesse suo, and the master found, that, as between the defendant and all persons claiming under him, the son had an absolute estate and interest in the premises under the conveyance, and the possession taken thereunder, subject to the question between the defendant's son and the plaintiffs, or between the court and plaintiffs and the defendant's son, arising out of the contempt and the sequestration: the court directed issues to try whether the conveyance by the defendant to his son was fraudulent, within the stat. 13 Eliz. c. 5; and whether the consideration monies were paid before the sequestration issued. *Empringham v. Short.* 461

2. Whether the proper form of objecting to the report of the master or an examination pro interesse suo, is by exceptions—*quare?* *Ib.*

See SEQUESTRATION.

PURCHASE-MONEY.

See INTEREST.

RECEIPT CLAUSE.

See SEPARATE USE.

RECEIVER.

1. Plaintiff, entitled to a legacy, charged on a West India estate, subject to prior debts and legacies remaining unpaid, not entitled to have a receiver appointed over the estate. *Faulkner v. Daniel,* 204

2. In suits by creditors and legatees a receiver was appointed of the rents and profits of real estate, part of which was copyhold. The death of the last tenant having been duly presented at the court-baron of the manor, proclamations were made for the next tenant to come in and be admitted, and, no person appearing, the bailiff of the manor was ordered to seize the lands quousque. Declaration in ejectment at the suit of the lord was afterwards served on the terre-tenant; but, on the motion of the receiver, the lord was restrained by injunction from prosecuting the action. *Evelyn v. Lewis,* 472

RECORDS.

Production of the original records of this court at trials in other courts. *Attorney-General v. Ray.* 335

See TAKING BILL OFF THE FILE.

RECOVERY.

See CONSTRUCTION, 1.

REDEMPTION.

See ESCHEAT.

REHEARING.

See STAY OF PROCEEDINGS, 5.

RELEASE.

See INFANT.

RELIGIOUS PURPOSE.

See CHARITY, 3.

REMOTENESS.

See LEGACY, 9.

RENT.

See EQUITABLE SET-OFF, 1.
STAT. 4 & 5 WILL. 4, c. 22.

REPLEVIN.

See PENALTIES.

REPUTATION.

See VENUE.

RESIDUARY LEGATEE.

See LEGACY, 7.
LEGATEES.
TENANCY IN COMMON.

RES JUDICATA.

See CO-DEFENDANTS.
JURISDICTION, 1.

RESTRAINT.

See ALIENATION

RETAINER.

See EQUITABLE SET-OFF, 1, 2, 3.

REVERSION.

See MORTGAGE, 1.
PARTIES, 1.

REVOCATION.

See ADEMPION, 2.

SALE.

See DOWER.
MORTGAGOR AND MORTGAGEE, 2.

SATISFACTION.

1. A trust fund, to which a father was entitled for life, and his son and daughter in remainder, was sold, and the proceeds received by the father. Subsequently, on the marriage of the daughter, the father settled property for her benefit of a larger value than the proceeds of the trust fund:—*Held*, that the claim of the daughter against the father in respect of her share of the proceeds of the trust fund must be presumed to be satisfied by the settlement. *Plunkett v. Lewis*, 316

2. That neither the expression in the settlement of the consideration of natural love and affection, nor the ignorance of the husband of the rights of the wife in the trust fund, had the effect of excluding the presumption, of satisfaction. *Ib.*

3. Evidence is admissible either to support or rebut the presumption—*semble*. *Ib.*

4. Whether, in the case of a portion of the precise amount of the debt, the expression of natural love and affection, as the consideration for the settlement, might not be material on the question of satisfaction—*quære?* *Ib.*

5. Advances made by a father to his son, simpliciter, not a purchase or satisfaction of the claim of the son to the proceeds of a trust fund belonging to the son, possessed by the father after such advances. *Id.* 330

SCHEME.

See CHARITY, 1.

SCIRE FACIAS.

See SUBSTITUTED SERVICE.

SECURITY.

See STAY OF PROCEEDINGS, 1.

SEPARATE USE.

1. Construction of a clause framed to restrain anticipation by a married woman of property settled to her separate use. *Harrop v. Howard*, 624

2. It is not necessary in all cases that negative words should be introduced in the receipt clause, to complete the restraint on anticipation, for that clause must be construed to relate to the income, subject to such restraints as are imposed by the former part of the settlement. *Ib*

SEQUESTRATION.

Where a sequestrator obtains possession of property, as belonging to the party against whom the process issued, and such property is claimed by a third person, the mode of trying the right is in the discretion of the court. *Empringham v. Short*, 461

SERVICE.

1 The leave of the court is necessary in order to serve personally a party out of the jurisdiction with notice of a motion in a cause, although such party has been served out of the jurisdiction, under the stat. 4 & 5 Will. 4, c. 82, with the subpoena to appear and answer, and an appearance has been entered for him in the suit under that statute. *Green v. Pledger*, 165

2. If a party in a suit may be served out of the jurisdiction, under the stat. 4 & 5 Will 4, c. 82, in respect of any part of the subject of the suit, the service is good for all the other purposes of the suit. *Ib*.

SET-OFF.

See EQUITABLE SET-OFF.

SETTLEMENT.

See SATISFACTION, 1.

SHIFTING CLAUSE.

See CONSTRUCTION, 1.

SIGN MANUAL.

See CHARITY, 1.

SOLICITOR AND CLIENT.

See PRODUCTION OF DOCUMENTS.

SPECIFIC CHATTELS.

1. Bill for the delivery up of specific chattels deposited by the plaintiff with A., his agent, which A. fraudulently contracted to assign to B., and B. advertised to be sold; and for an injunction to restrain the sale by B., and to restrain A. and B. from parting with the goods, the goods being still in the possession of A., the agent. Demurrer by B. overruled. *Wood v. Rowcliffe* 304

2. Whether the jurisdiction to protect by injunction the possession, and decree the delivery up of specific chattels, is confined to chattels the loss or injury of which would not be adequately compensated in damages, or which it may not be possible specifically to replace—*quære?* *Wood v. Rowcliffe*. 304

SPECIFIC PERFORMANCE.

See EVIDENCE, 3.

STAT. 13 ELIZ. c. 5.

See PRO INTERESSE SUO.

STAT. 21 JAC. 1, c. 16, (LIMITATION.)

See CREDITORS' SUIT.
DEBTOR AND CREDITOR.
EQUITABLE SET-OFF, 2.
EVIDENCE, 4.
PARTNERSHIP, 1.

STAT. 7 GEO. 2, c. 20, s. 2.

See MORTGAGOR AND MORTGAGEE, 1.

STAT. 40 GEO. 3, c. 98.

See ACCUMULATION.

STAT. 1 WILL. 4, c. 60, s. 23.

By an indenture of 1634, a rent-charge was granted to certain trustees for charitable uses, and, the last survivor of such trustees being unknown, the court, under the stat. 1 Will. 4, c. 60, s. 23, on the petition of the persons who administered the charity before the rent-charge ceased to be paid, appointed new trustees, and a person to convey the rent-charge to such trustees. *In re 1 Will. 4, c. 60, and in re Nightingale's Charity,* 336

STAT. 1 WILL. 4, c. 60.

Three trustees, two of whom were creditors of A., joined in making promissory notes for securing to the other creditors of A. a composition on their respective debts, and took a conveyance and assignment of the real and personal estate of A., upon trust, after paying the costs and charges, to indemnify the three trustees in respect of the promissory notes, and then to pay the two trustees, who were creditors, a like composition on their respective debts, and to pay the surplus to A. After two of the trustees had received part of the personal estate of A., and had paid the promissory notes to a larger amount than they had received, the other trustee (who was one of the creditors) went out of the jurisdiction of the court. There was no power in the deed to appoint new trustees:—*Held*, on the petition of the two trustees, that the trustee out of the jurisdiction was a trustee within the act 1 Will. 4, c. 60, for the petitioners and himself, and the court, without directing a bill to be filed, appointed another trustee in his stead. *In re George Ryley,* 614

STAT. 3 & 4 WILL. 4, c. 27.

1. A. T., a person of unsound mind, living in the family of M. D., became entitled as heiress-at-law to certain lands. M. D. received the rents and profits of such lands

for thirteen years during the life of A. T., and eleven years after her death, when M. D. died. M. D. had procured A. T. to execute a will devising part of her estate, and also indentures for conveying other parts, to M. D. and her heirs:—*Held*, that procuring instruments of conveyance and devise to be executed by a person of unsound mind was a fraud within the stat. 3 & 4 Will. 4, c. 27, s. 26. *Lewis v. Thomas,* 26

2. *Semble*, that; after issues had been directed, on motion, to try the validity of the instruments executed by A. T., and whether she was of sound mind, the order being submitted to, it was no longer open to those claiming under M. D. to insist, at the hearing, that the claim of the heirs of A. T. was barred by the Statute of Limitations, 3 & 4 Will. 4, c. 27. *Ib.*

See ADVERSE POSSESSION.

STAT. 3 & 4 WILL. 4, c. XLVI, (LONDON AND GREENWICH RAILWAY ACT.)

See COSTS, 1.

STAT. 3 & 4 WILL. 4, c. 104.

Where a person dies seised of land which he has not by will charged with his debts, the statute 3 & 4 Will. 4, c. 104, makes the lands themselves, and not merely the estate or interest of such person in the lands, assets for the payment of his debts. *Viscount Downe v. Morris,* 399

See ESCHEAT, 1, 2.

STAT. 4 & 5 WILL. 4, c. 22.

The statute 4 & 5 Will. 4, c. 22, for the apportionment of rents and other periodical payments, applies to cases in which the interest of the person interested in such rents and payments is terminated by his death or by the death of another person, but does not apply to the case of a tenant in fee, or provide for apportionment of rent between the real and personal representative of such person whose interest is not terminated at his death. *Browne v. Amyot,* 173

STAT. 4 & 5 WILL. 4, c. 82.

See SERVICE, 1, 2.

STAT. 1 VICT. c. 26, ss. 3, 24, 33.

The 33rd section of the stat. 1 Vict. c. 26, which provides, that, where a child or other issue of the testator, to whom any real or personal estate shall be devised or bequeathed, shall die in the lifetime of the testator leaving issue, and any such issue shall be living at the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after that of the testator, does not substitute for the pre-deceased devisee or legatee the issue whose existence is the event or condition which excludes the lapse, but renders the subject of the gift the absolute property of the pre-deceased devisee or legatee, and therefore disposable by his will, notwithstanding his death before the death of the testator. *Johnson v. Johnson*, 157

STAT. 1 & 2 VICT. c. 110, ss. 14, 15.

1. After the order, obtained by a judgment creditor, for charging the interest of his debtor in government stock, standing in the name of trustees, has been made absolute, under the statute 1 & 2 Vict. c. 110, s. 15, the Bank of England is still bound to pay the dividends to the trustees, being the legal hands to receive them; and the trustees are to apply the dividends according to the equitable interests of the parties. *Bristed v. Wilkins*, 235

2. *Semble*, a judgment creditor who has obtained an order charging the interest of his debtor in government stock may, in a proper case, sustain a suit for the intermediate protection of the interest which he has so acquired, notwithstanding the six months prescribed by the stat. 1 & 2 Vict. c. 110, s. 14, have not expired. *Ib.*

STAY OF PROCEEDINGS.

1. After dismissal of a bill for a legacy, against executors who were also residuary legatees, the plaintiff applied to stay the transfer out of court, pending an appeal from the decree, of a sum of stock which stood to the credit of the cause; and the

court ordered, that, on the plaintiff undertaking to submit to any order the court might thereafter make for payment of interest or costs, the transfer of the fund should be stayed, with liberty to the defendants to apply for such transfer, upon security to be given by them. *Gloucester (Mayor, &c.) v. Wood*, 150

2. In such a case, the question must be considered as if the appeal were by the residuary legatees for payment of the residue, notwithstanding an appeal from the decree by the particular legatee. *Ib.*

3. It is in the discretion of the judge to stay the execution of a decree, although a case of irreparable mischief may not be shown to be a necessary consequence of such execution. *Ib.*

4. Consideration of the difference in the effect of a decree dismissing a bill, as deciding that the position of the parties at the institution of the suit ought not to be altered, and a decree directing an act to be done which would vary that position. *Ib.*

5. Pending an appeal by the defendant, from an order overruling a plea to discovery, a motion to stay the proceedings for compelling the defendant to put in his answer was refused, on the ground, that the court saw no doubt as to the question which was the subject of appeal, and that no injury would result to the defendant from giving the discovery. *Drake v. Drake*, 528

STOCK.

See MORTGAGE, 1.

STAT. 1 & 2 VICT. c. 26, ss. 14, 15.

SUBPCENA.

See PARTIES, 6.

SUBSTITUTED SERVICE.

1. In 1834, S. employed B. as his agent and solicitor in the matter in question, and B., in that capacity, corresponded with W. thereon. In 1843, S., who then resided abroad, being informed that the representative of W. was about to file a bill against him on the same matter, directed that he

should be referred to B., in whose hands the matter had been. B. stated that he had no authority to appear for S., and was not professionally concerned for him:—*Held*, that service on B., of the subpoena to appear and answer the bill, could not be substituted for service on S. *Webb v. Salmon*. 251

2. In a suit by a shareholder in a banking company, to restrain proceedings on, and set aside, a judgment against the public officer of the bank, the court allowed substituted service of the subpoena upon the attorney at law in the judgment, where the plaintiff at law was out of the jurisdiction, although he had not caused a scire facias on the judgment to be issued against the plaintiff in equity. *Woodall v. Walker*, 339

See SERVICE.

SUBSTITUTION.

Bequest of an annuity of 800*l.* to the testator's wife, followed by a bequest (among others) of an annuity of 200*l.* to the testator's daughter, and a subsequent direction, in the same instrument, that, at the death of the testator's wife, the daughter was to have 400*l.* a year:—*Held*, that the annuity of 400*l.* given to the daughter was in substitution for, and not in addition to, the prior annuity of 200*l.* given to the same legatee. *Yockney v. Hansard*, 620

See LEGACY, 12.

SUPPLEMENTAL BILL.

1. On a supplemental bill, relief may be given of a nature different from that which was prayed by the original bill, where it proceeds upon circumstances arising out of subsequent dealings with the subject-matter of the original suit. *Malcolm v. Scott*, 39

2. In a suit by the heir of the mortgagor, against different classes of mortgagees and incumbrancers on the estate, some of whom were in possession, a decree for redemption was made, under which certain of the defendants were declared entitled to a lien on the estate, and the accounts were directed to be taken, and upon the plaintiff paying to the defendants, the incumbrancers, what should be found due to them

respectively, within the time thereby limited, they were ordered to convey the estates to the plaintiff; but in default of the plaintiff making such payment, his bill was ordered to be dismissed with costs. In a supplemental suit, brought by some of the defendants to the original suit against the plaintiff and the other defendants, a decree for carrying on the accounts was made:—*Held*, that the plaintiffs in the supplemental suit, who were incumbrancers subsequent to other defendants, were not entitled, under the decree, to exhibit interrogatories for the examination of their co-defendants in the original suit, (the prior incumbrancers, who were mortgagees in possession,) as to their receipts in respect of the mortgaged premises, such examination not being necessary for the purposes of the suit. *Cottingham v. Earl of Shrewsbury*, 627

See PARTIES, 5.

TAKING BILL OFF THE FILE.

Bill taken off the file by consent. *Walton v. Broadbent*, 334

TENANCY IN COMMON.

1. Bequest of residuary estate to accumulate for ten years, and then to be distributed in seven equal shares unto seven persons named in the will, and appointment of the same seven persons residuary legatees, creates a tenancy in common; and the share of one dying in the testator's lifetime belongs to the next of kin of the testator. *Norman v. Frazier*, 84

See CY PRES, 2.

TENANT BY ELEGIT.

See EQUITABLE MORTGAGE.

TENANT FOR LIFE.

Charges paid off by the tenant for life prima facie kept alive and not merged in the inheritance. *Faulkner v. Daniel*, 217

See ADMINISTRATION, 1, 2.
APPORTIONMENT, 1.
CY PRES, 4, 5.

TENANT IN FEE.

See STAT. 4 & 5 WILL, 4, c. 22.

TENANT IN TAIL.

See CY PRES, 4, 5.

TERM OF YEARS.

See ESCHEAT.

TIME OF VESTING.

See CONSTRUCTION, 2.

TITLE.

See COSTS, 1.

TITLE-DEEDS.

See DISCOVERY.

TOLLS.

See PENALTIES.

TRAVERSING NOTE.

See ANSWER.

TRIAL AT LAW.

See CONSIDERATION.

TRUST.

See ADMINISTRATION, 1, 2, 3.
ALIENATION.
EQUITY OF REDEMPTION.
LEGACY, 7.

TRUSTEE.

The institution of a suit against trustees
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for the administration of the trust estate under the direction of the court does not preclude the exercise of the discretion given to the trustees by the will of the testator, as to the appointment of new trustees or the management of the trust; but the trustees are required, after the institution of the suit, to act under the control of the court. *Cafe v. Bent*, 245.

See PARTIES, 1, 4, 7.
STAT. 1 WILL. 4, c. 60.
STAT. 1 & 2 VICT. c. 110, s. 15.

TRUSTEE AND CESTUI QUE TRUST.

See INFANT.

UNCERTAINTY.

See LEGACY, 6.

VENDOR AND PURCHASER.

A purchaser, complaining that his conveyance did not comprise the whole of the property which he had contracted for, filed his bill for a conveyance of the remainder, and obtained an injunction restraining the vendor from suing him for the purchase-money, part of which was afterwards ordered to be paid into court to abide the event of the suit. The bill was dismissed:—*Held*, that the vendor was entitled to the residue of the purchase-money, and the interest upon it, to the time of payment, although the purchase-money in court had not been laid out, and no interest, therefore, had accrued thereon. *Humphries v. Horne*, 276

See COSTS, 1, 2.

VENUE.

The influence upon the minds of the jurors, which might possibly be produced by the reputation of a material witness on a trial, in affecting the relative credit to be given to the testimony of that and the other witnesses, is no ground of changing the venue from the county or neighborhood in which such material witness resides and is best known. *McGregor v. Topham*, 488

VESTING.

See CONSTRUCTION, 2.
LEGACY, 12.

WILL.

See CONSTRUCTION.
LEGACY.
MISTAKE.
STAT. 1 VICT. c. 26, ss. 3, 24, 33.

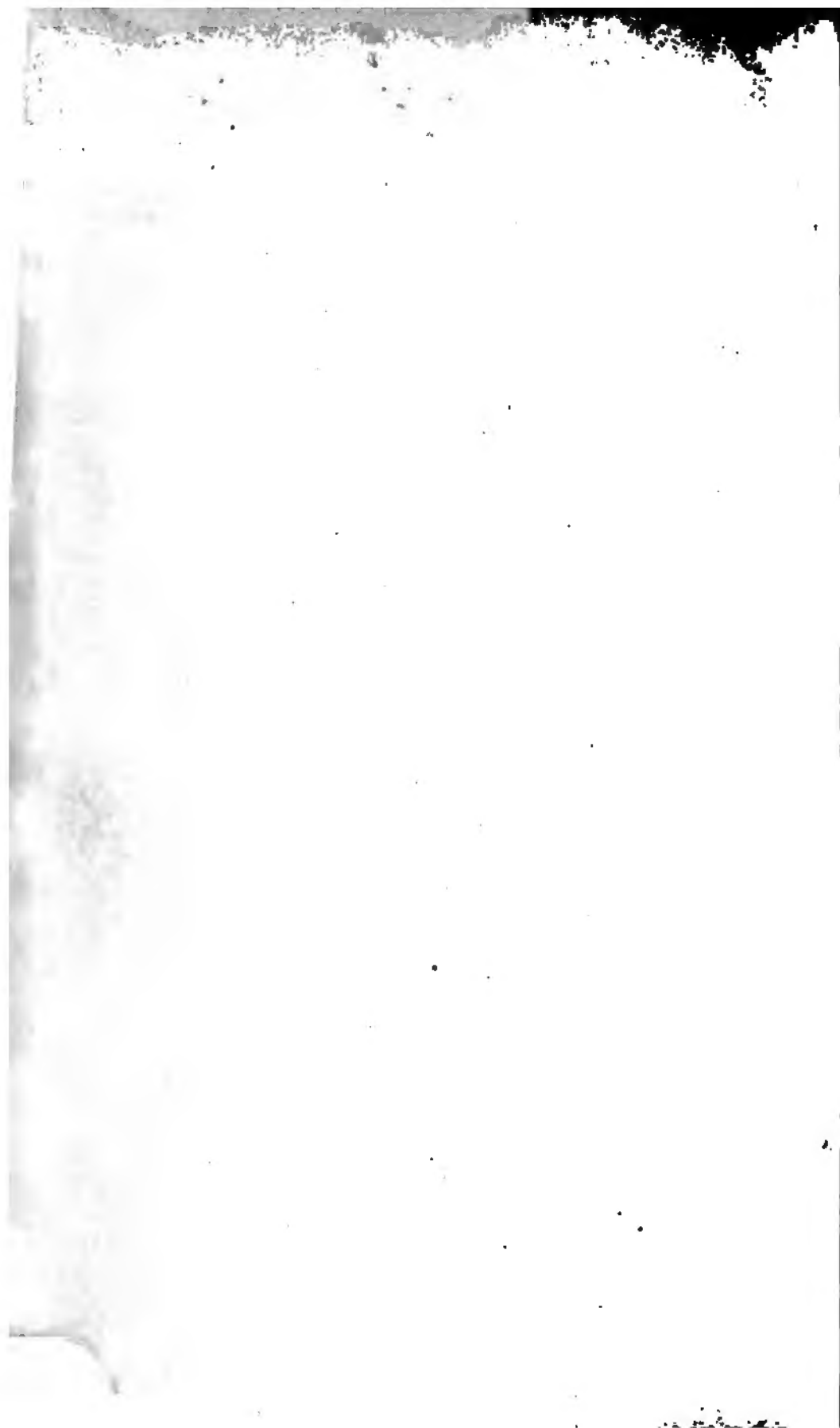
WITNESS.

The plaintiff in a creditor's suit called

a witness to prove the execution of a bond upon which his debt was founded. The defendant, the executor, cross-examined the witness as to the consideration. On the proving of the debts before the Master, the defendant insisted that the bond was usurious, and obtained leave to examine the witness again upon interrogatories to be settled by the Master, on a motion by the plaintiff—*Held*, that the plaintiff was entitled to cross-examine the witness: that the application by the plaintiff for leave to cross-examine the witness was proper; that the cross interrogatories to be exhibited by the plaintiff need not be settled by the Master. *Whitaker v. Wright*, 412

See VENUE.





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